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SUPREME COURT OF THE UNITED STATES.

No. 684.—October Term, 1944.

Copperweld Steel Company, Appellant, *vs.* Industrial Commission of Ohio.	Appeal from the Supreme Court of the State of Ohio.

[April 23, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant conducts a manufacturing plant at Warren, Ohio, and is an employer as the term is defined by the workmen's compensation law of the State. In an original proceeding instituted in the Supreme Court, the State's highest tribunal, it challenged awards made to certain of its employees, alleging that the injuries suffered were not incurred in the course of, and did not arise out of, the employment; that the awards were, therefore, beyond the jurisdiction of the Industrial Commission which entered them, and, unless they were abrogated, the appellant would be deprived of its property without due process of law; further, that unless relief were afforded the appellant would be denied the equal protection of the laws.

From a decision sustaining a demurrer and granting judgment for the defendant[1] this appeal was taken. The appellee moved to dismiss. We postponed consideration of the motion to the hearing on the merits, as we were not satisfied that the appellant had properly presented in the court below any issue as to the infirmity of the state law under the federal Constitution, or that the judgment of the Supreme Court of Ohio did not rest on an application of state law adequate to support it.

The questions posed for our decision, the manner of their presentation to the state court and that court's disposition of them will be understood only in the light of the provisions of the workmen's compensation law, the commission's action under that law, and the character of the relief sought by the appellant.

The compensation law is of the compulsory type.[2] It is ad-

[1] The petition was held demurrable (142 O. S. 439) was amended, demurred to, and judgment for defendant was rendered on demurrer (143 O. S. 591).

[2] The summary of the statutory provisions is drawn from the General Code of Ohio, §§ 871-1-871-12; 871-38; 1465-37; 1465-53; 1465-54; 1465-60,-68,-69,-69a,-70,-72,-73,-74,-75,-90.

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ministered by an Industrial Commission, which classifies industries in respect of hazards, and fixes premiums to be paid by employers into a state fund for the benefit of injured workmen and the dependents of those killed. It may adopt merit ratings which reduce the premiums of employers having a low casualty rate.

Every employer subject to the Act is required either to pay premiums into the fund, or to qualify as a self-insurer. Payments of compensation for injury or death are made from the state fund in respect of employees of a contributing employer and are paid directly by a self-insuring employer. Employers of both classes are relieved of common-law liability for an employee's injury or death. Those, however, who fail to comply in one of the permissible ways remain liable at law, are denied certain defenses in an action by the employee or his representative and, with their officers, are liable to criminal penalties for failure to comply with the Act. Their employees may, nevertheless, elect to claim compensation, and if it is awarded, an action to recover the amount may be maintained against the employer. Such an action may also be maintained against a self-insuring employer who fails to pay an award.

Should an employer who is subject to the Act fail to pay premiums, or otherwise omit to comply, means are provided to fix civil liability upon him, even to the extent of the appointment of a receiver of his business.

The Commission has authority to hear and decide all questions within its jurisdiction. If it makes an award to a claimant its action is final. Neither the employer nor the claimant is given any appeal or right of review. If the Commission refuses an award on certain grounds specified in the Act the claimant may appeal to a court.

It is conceded by the appellee that if a self-insuring or a non-complying employer is sued for the amount of an award the defense is open to him that the employee granted the award was not injured in the course of his employment or that the injury did not arise out of the employment. In the case of a complying employer who pays premiums into the state fund no such defense is open, for the award is paid from the fund and he is not a party to the transaction.

We turn now to the facts alleged in appellant's petition. So far as material they follow. The men who were injured or killed were employees in appellant's plant. At the close of their work they left the plant in an automobile and chose one of several ways

of egress,—a public road, which at a short distance from the plant crossed the Baltimore & Ohio Railroad's track. While crossing this track the automobile was struck by a train. The Commission, despite appellant's representation that the resulting injuries and deaths were not compensable under the Act, entered awards. By its amended petition the appellant showed that as a result of the inclusion of the awards in its accident experience its premiums had been greatly increased.

On the first hearing the Supreme Court overruled appellant's contention that § 871-38 of the code authorized the institution of proceedings in that court to set aside compensation awards. Treating the petition as one for a writ of prohibition, the court held that remedy unavailable to control the action of the Commission in rendering awards. If considered as an application for mandamus, the court found that the provisions of the workmen's compensation law precluded the issuance of the writ. Construing the prayer as one for injunction the court held that the law of Ohio invested it with no original jurisdiction in equity, and that general equity jurisdiction is conferred on the Courts of Common Pleas of the State. These are all rulings as to the law of Ohio, and, as such, we are without power to review them.

In its amended petition the appellant insisted that its purpose was to raise questions of constitutionality; and that it was without remedy against the loss of its merit rating and the increase of its premiums unless the court should set aside the awards.

In a second opinion the court noticed these allegations. It held that as appellant was not a party to the compensation proceeding and as the awards were payable, not by the appellant, but by the state fund, in which appellant had no property interest, it could not be said that payment of the awards deprived appellant of any property. It said that appellant's interests could be affected only when it was called on to pay increased premiums as a result of the awards, and adverted to the fact that appellant could refuse to pay premiums, and defend a suit for them brought under § 1465-75 of the Act. As to this the appellant urges that the penalties, civil and criminal, which would be imposed upon it and its officers if it pursued such a course amount to a denial of all remedy. Of this more hereafter.

In respect of the denial of equal protection the court below seems not to have dealt with the argument as presented in this court. It quoted decisions which sustained as reasonable classifications of employers for imposition of varying rates of premium adjusted to the risks incident to their enterprises. Except as

above noted, it had nothing to say to the appellant's contention that whereas self-insurers and non-compliers may make the defense of excess of the Commission's jurisdiction when sued for the amount of an award, it cannot assert such a defense when sued for premiums. In our view the answer to both of the constitutional contentions, though not clearly expressed below, is that it does not appear the appellant is without remedy, if entitled to redress. For it is stated, without contradiction, that there are courts in the state having general equity jurisdiction, and if resort to a defense at law involves the perils and penalties the appellant asserts, we are not advised that equity will not consider an application for relief. Certainly we can neither require the Supreme Court to exercise a jurisdiction it finds is not conferred upon it by law, nor express any view as to the relief to which the appellant may be entitled, in advance of its availing itself of a forum apparently not foreclosed to it for the protection of its asserted constitutional rights.

What has been said assumes that we have jurisdiction of the appeal. The assumption involves the answer to two questions. First, were questions under the Fourteenth Amendment presented and decided below? We think that the appellant disclosed, and the court below understood, that the provisions of the Fourteenth Amendment of the federal Constitution were invoked. Not only does the Ohio Constitution embody no provisions in the words of that Article but it is doubtful that it contains any equivalent provisions. While the appellant's petition did not mention the Amendment it used the exact phraseology in which it is couched. The pleadings and the expressions found in the opinions lead us to conclude that questions under the federal charter were presented and considered.

Secondly, was the constitutional validity of the state statute drawn in question? If not, we have no jurisdiction on appeal. But, as violation of the federal Constitution by the decision of the state court, is, in any case, involved, we have jurisdiction to review the decision on certiorari (28 U. S. C. 344(c)). The question of the propriety of entertaining the appeal need not be decided, in the view we take of the basis of the state court's judgment. Inasmuch as we conclude that decision was grounded upon the view that the appellant had not pursued the remedy afforded by state law for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal, and deny certiorari.

So ordered.

4-23-44 (2)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 684

COPPERWELD STEEL COMPANY, APPELLANT,

vs.

INDUSTRIAL COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED NOVEMBER 15, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 684

COPPERWELD STEEL COMPANY, APPELLANT,

vs.

INDUSTRIAL COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

[fol. 3] **IN THE SUPREME COURT OF OHIO**

No. 29746

COPPERWELD STEEL COMPANY, Warren, Ohio, Plaintiff,

v.

THE INDUSTRIAL COMMISSION OF OHIO, Consisting of Will T. Blake, James A. White, and G. L. Coffinberry, Defendant

PETITION—Filed September 4, 1943

Now comes Copperweld Steel Company and for its petition says that it is, and at all times was, a corporation operating an industrial plant near the city of Warren, Ohio, and an employer contributing to the State Insurance Fund and otherwise fully complying with the Workmen's Compensation Laws of Ohio, and further that:

First Cause of Action

Under date of June 11, 1943, the defendant entered an order, of which this plaintiff was notified June 16, 1943, in Claim numbered 1567631 on its docket, that one Sylvia Diomataris, for herself and in behalf of her infant son, Gus Diomataris, as dependents of Isidoros Diomataris an employee of plaintiff herein, was entitled to Workmen's Compensation and payment of medical and funeral bills from the State Insurance Fund, by reason of the death of Isidoros (otherwise known as Isadore or Steve) Diomataris, husband [fol. 4] and father of the said Sylvia and Gus Diomataris respectively, resulting from a collision, hereinafter more particularly described, between an automobile and a railroad train on November 13, 1941.

Thereafter and on or about the 2nd day of July, 1943, the plaintiff filed with the defendant its petition for hearing and reconsideration of the claim and order aforesaid, for vacation of such order and disallowance of such claim; and upon hearing thereof the defendant, under date of August 9, 1943, again entered an order that Sylvia Diomataris for

and in behalf of herself and infant son, Gus Diomataris, was entitled to Workmen's Compensation and the payment of medical and funeral expenses from the State Insurance Fund by reason of the death of Isadoros Diomataris. The finding in such order that the injury which resulted in decedent's death was not purposely self-inflicted is contrary to the uncontroverted evidence before the Commission and is not supported by any evidence.

Second Cause of Action

Under date of June 11, 1943, the defendant entered an order, of which this plaintiff was notified June 16, 1943, in Claim numbered 1567632 on its docket, for the payment of medical and funeral expenses from the State Insurance Fund by reason of the death of Leon (otherwise known as Leonidas) Serres, an employe of plaintiff herein, resulting from a collision, hereinafter more particularly described, between an automobile in which he was riding and a railroad train on November 13, 1941.

[fol. 5] Thereafter and on or about the 2nd day of July, 1943, the plaintiff filed with the Industrial Commission its petition for hearing and reconsideration of the claim and order aforesaid, for the vacation of such order and disallowance of such claim; and upon hearing thereof the defendant, under date of August 9, 1943, again entered an order for the payment of medical and funeral expenses from the State Insurance Fund by reason of the death of Leon (otherwise known as Leonidas) Serres.

Third Cause for Action

Under date of June 11, 1943, the defendant entered an order, of which this plaintiff was notified June 16, 1943, in Claim numbered 1567660 on its docket, that one Costas Perris, as an employe of plaintiff herein, was entitled to Workmen's Compensation and payment of medical expenses from the State Insurance Fund by reason of injuries sustained by him in a collision between an automobile in which he was riding and a railroad train on November 13, 1941. The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits

were not payable if the injuries arose out of or in the course of any employment for wage or profit.

Thereafter on or about July 2, 1943, the plaintiff filed its petition for hearing and reconsideration of the claim and order aforesaid, for vacation of such order and disallowance of such claim; and thereafter, on or about the 12th day of [fol. 6] July, 1943, filed it- amendment to such petition; and upon hearing thereof the defendant under date of August 9, 1943, again entered its order that Costas Perris was entitled to Workmen's Compensation and payment of medical expenses from the State Insurance Fund by reason of the injuries aforesaid.

Fourth Cause of Action

Under date of June 11, 1943, the defendant entered an order, of which this plaintiff was notified June 16, 1943, in Claim numbered 1567661 on its docket, that one Markos Mamoujelos, as an employe of plaintiff herein, was entitled to Workmen's Compensation and payment of medical expenses from the State Insurance Fund by reason of injuries sustained by him in a collision between an automobile in which he was riding and a railroad train on November 13, 1941. The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit.

Thereafter on or about July 2, 1943, the plaintiff filed with the defendant its petition for hearing and reconsideration of the claim and order aforesaid, for vacation of such order and disallowance of such claim; and upon hearing thereof the defendant under date of August 9, 1943, again entered its order that Markos Mamoujelos was entitled to Workmen's Compensation and payment of medical ex- [fol. 7] penses from the State Insurance Fund by reason of the injuries aforesaid.

Fifth Cause of Action

Under date of June 11, 1943, the defendant entered an order, of which this plaintiff was notified June 16, 1943, in Claim numbered 1568161 on its docket, that one Antonios (otherwise known as Antonio or Anthony) Spanolios, as an

employe of plaintiff herein, was entitled to Workmen's Compensation and payment of medical expenses from the State Insurance Fund by reason of injuries sustained by him in a collision between an automobile in which he was riding and a railroad train on November 13, 1941. The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit.

Thereafter on or about July 2, 1943, the plaintiff filed with the defendant its petition for hearing and reconsideration of the claim and order aforesaid, for vacation of such order and disallowance of such claim; and upon hearing thereof, the defendant under date of August 9, 1943, again entered its order that Antonios Spanolios was entitled to Workmen's Compensation and payment of medical expenses from the State Insurance Fund by reason of the injuries aforesaid.

[fol. 8] *Sixth Cause of Action*

Under date of June 11, 1943, the defendant entered an order of which this plaintiff was notified June 16, 1943, in Claim numbered 1570313 on its docket, that one Tom Russ, as an employe of plaintiff herein, was entitled to Workmen's Compensation and payment of medical expenses from the State Insurance Fund by reason of injuries sustained by him in a collision between an automobile in which he was riding and a railroad train on November 13, 1941. The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit.

Thereafter on or about July 2, 1943, the plaintiff filed its petition for hearing and reconsideration of the claim and order aforesaid, for vacation of such order and disallowance of the claim; and upon hearing thereof, the defendant under date of August 9, 1943, again entered its order that Tom Russ was entitled to Workmen's Compensation and pay-

ment of medical expenses from the State Insurance Fund by reason of the injuries aforesaid.

In addition to the particular allegations of the several causes of action above, plaintiff alleges, in respect and as a part of each and all of them, that:

[fol. 9] All of the injuries and deaths involved in the claims referred to in each of the causes of action hereinbefore set forth resulted from the collision of an automobile driven by Isidoros Diomataris and in which the other injured and deceased men were riding as passengers, with a regular through freight train of the Baltimore and Ohio Railroad Company on the morning of November 13, 1941, after the injured and deceased men had finished their work at the plant of Copperweld Steel Company, left the plant, entered the automobile and proceeded a distance of not less than 700 feet over a roadway to a grade crossing on land owned and maintained by the railroad company. The approach of the train for at least 1000 feet before it reached the crossing at which the collision occurred was clearly visible to the driver and occupants of the automobile involved in the collision aforesaid, during the entire distance traveled by them. The passengers in the automobile had called the attention of the driver, Diomataris, to, and warned him of, the approach of the train which was within his view and requested him to stop the car to avoid a collision; but nevertheless, willfully and knowing that a collision would occur if he did not heed the warning and request of his passengers, he proceeded to overtake and pass another automobile which had stopped to permit the train to pass and drove upon the intersection into collision with the train. The hazards at the crossing at which the collision occurred were not greater than those to which the general public were subject and were in nowise created or increased by the employment or by the operation of the plaintiff's plant but were in fact much [fol. 10] less than the hazards to which the general public was subject, particularly at other railroad crossings on public highways which it would have been necessary for the deceased and injured men to traverse in going to their homes; they were likewise much less than the hazards at crossings of railroads and public highways which it was necessary for men employed at other point in and near

the city of Warren to traverse in going to and from their homes and work.

The orders of the defendant are unreasonable and unlawful for the following reasons, to-wit:

(a) The collison which resulted in the injuries and deaths involved in the claims aforesaid did not arise in the course of or out of the employment of any of the employees and had no casual relation thereto.

(b) The finding in each of such orders that the employe's injury was sustained in the course of his employment is not supported by any evidence, but is contrary to the uncontroverted evidence before the Commission.

(c) The findings and orders of the Commission in each of the claims other than the Diomataris claim disregard and are contrary to the admission against interest of each of the claimants, by the sworn allegations in a petition involving the same injuries filed by each of such claimants in the Court of Common Pleas of Trumbull County, Ohio, against the administrator of the estate of the driver, Diomataris, that the driver knew he was driving his automobile toward the railroad crossing, that a train was approaching within his view, that he proceeded to drive around and overtake an automobile immediately preceding him and willfully, wantonly, and recklessly drove his automobile across [fol. 11] the railroad although he had been warned and his attention called to said railroad crossing and approaching train and requested to stop his car and avoid a collision, knowing the location of the approaching train and that collision was inevitable unless he arrested the speed or stopped his car.

(d) The railroad and the road, at the crossing of which the collision causing the injuries and deaths involved herein occurred, had been constructed and were in use long prior to the acquisition by plaintiff of its plant; and the immediate hazards which caused the collision of the train and of the automobile were created by the Baltimore and Ohio Railroad Company and the deceased driver, Isidoros Diomataris.

(e) The orders of the defendant are contrary to law, constitute a gross abuse of discretion, if any, and of

the power and authority, of the defendant and are beyond the jurisdiction of the defendant.

(f) The aforesaid orders of the Commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's Workmen's Compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess of those which should and may legally be charged and collected.

(g) The aforesaid orders of the Commission, unless vacated, prohibited or enjoined, will deprive the plaintiff of its property without due process of law and will deny it the equal protection of the laws.

(h) By reason of the foregoing, unless the defendant be prohibited and enjoined from proceeding to make payments under the orders aforesaid, and from taking into consideration any payments made thereunder in the merit, or individual, rating of this plaintiff's Workmen's Compensation risk, and unless such orders be set aside and vacated, this plaintiff will suffer irreparable damage which for it has no other remedy in the ordinary course of law.

[fol. 12] Wherefore plaintiff prays that each and all of the aforesaid orders of the Industrial Commission be set aside, vacated and reversed; that the aforesaid claims and each of them be disallowed; that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's Workmen's Compensation risk, and requiring the defendant to vacate such orders and disallow such claims; and for all such further relief to which the plaintiff may be entitled.

Robert G. Day, Second National Bldg., Warren, Ohio,
E. P. McHugh, Jr., Republic Bldg., Cleveland, Ohio, Attorneys for Plaintiff.

[fols. 13-16] *Duly sworn to by William B. Klee, Jr. Jurat omitted in printing.*

[fol. 17] [File endorsement omitted]

[fol. 18] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION TO STRIKE—Filed Oct. 29, 1943

Now comes the defendant, the Industrial Commission of Ohio, and moves this Court to require the plaintiff to strike from its petition herein, as immaterial, irrelevant and conclusions of law, the following language:

I

The last sentence of the second paragraph of the First Cause of Action (page 2) which reads:

> "The finding in such order that the injury which resulted in decedent's death was not purposely self-inflicted is contrary to the uncontroverted evidence before the Commission and is not supported by any evidence."

II

The second sentence of the first paragraph of the Third Cause of Action (page 3) which reads:

[fol. 19] "The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

III

The second sentence of the first paragraph of the Fourth Cause of Action (page 4) which reads:

> "The claimant has previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

IV

The second sentence of the first paragraph of the Fifth Cause of Action (page 5) which reads:

> "The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

V

The second sentence of the first pararaph of the Sixth Cause of Action (page 6) which reads:

> "The claimant had previously made application for and received and accepted payment of accident disability and surgical expense benefits by reason of the same injuries under a group insurance policy by the terms of which such benefits were not payable if the injuries arose out of or in the course of any employment for wage or profit."

[fol. 20]

VI

The second and third sentences of the paragraph beginning on page 7 which read:

> "The approach of the train for at least 1000 feet before it reached the crossing at which the collision occurred was clearly visible to the driver and occupants of the automobile involved in the collision aforesaid, during the entire distance traveled by them. The passengers in the automobile had called the attention of the driver, Diomataris, to, and warned him of, the approach of the train which was within his view and requested him to stop the car to avoid a collison; but nevertheless, willfully and knowing that a collison would occur if he did not heed the warning and request of his passengers, he proceeded to overtake and pass another automobile which had stopped to permit the train to pass and drove upon the intersection into collision with the train."

VII

The fourth sentence of the paragraph beginning on page 7, which sentence continues on page 8 and reads:

"The hazards at the crossing at which the collision occurred were not greater than those to which the general public were subject and were in no wise created or increased by the employment or by the operation of the plaintiff's plant but were in face much less than the hazards to which the general public was subject, particularly at other railroad crossings on public highways which it would have been necessary for the deceased and injured men to traverse in going to their homes; they were likewise much less than the hazards at crossings of railroads and public highways which it was necessary for men employed at other plants in and near the city of Warren to traverse in going to and from their homes and work."

VIII

The word "unreasonable" in the first line of the first paragraph on page 8.

[fol. 21] IX

Sub-paragraph (c) of the first paragraph beginning on page 8 which reads:

"The findings and orders of the Commission in each of the claims other than the Diomataris claim disregard and are contrary to the admission against interest of each of the claimants, by the sworn allegations in a petition involving the same injuries filed by each of such claimants in the Court of Common Pleas of Trumbull County, Ohio, against the administrator of the estate of the driver, Diomataris, that the driver knew he was driving his automobile toward the railroad crossing, that a train was approaching within his view, that he proceeded to drive around and overtake an automobile immediately preceding him and willfully, wantonly, and recklessly drove his automobile across the railroad although he had been warned and his attention called to said railroad crossing and approaching train and requested to stop his car and avoid a collision, knowing the location of the approaching train and

that collision was inevitable unless he arrested the speed or stopped his car."

X

Sub-paragraphs (d), (f), (g) and (h) on page 9 of the paragraph beginning on page 8 which read:

(d) "The railroad and the road, at the crossing of which the collision causing the injuries and deaths involved herein occurred, had been constructed and were in use long prior to the acquisition by plaintiff of its plant; and the immediate hazards which caused the collision of the train and of the automobile were created by the Baltimore and Ohio Railroad Company and the deceased driver, Isidoros Diomataris.

(f) "The aforesaid orders of the Commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's Workmen's Compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess of those which should and may legally be charged and collected.

[fols. 22-56] (g) "The aforesaid orders of the Commission, unless vacated, prohibited or enjoined, will deprive the plaintiff of its property without due process of law and will deny it the equal protection of the laws.

(h) "By reason of the foregoing, unless the defendant be prohibited and enjoined from proceeding to make payments under the orders aforesaid, and from taking into consideration any payments made thereunder in the merit, or individual, rating of this plaintiff's Workmen's Compensation risk, and unless such orders be set aside and vacated, this plaintiff will suffer irreparable damage which for it has no other remedy in the ordinary course of law."

XI

All of the prayer of the petition *except* that portion thereof which reads:

"* * * that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of

them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's Workmen's Compensation risk, * * *".

Thomas J. Herbert, Attorney General, Robert E. Hall, Assistant Attorney General, Attorneys for Defendant.

[Brief in support of foregoing motion omitted in printing.]

[fol. 57] IN SUPREME COURT OF OHIO

OPINION SUSTAINING MOTION TREATED AS DEMURRER TO PETITION

(142 O.S. 439)

* Industrial Commission—Appeal to Supreme Court by employer or other party in interest—Section 871-38, General Code—Inapplicable to award of workmen's compensation—Prohibition—Writ not issued to prevent award of workmen's compensation—Mandamus—Discretion not controlled by writ—But performance of duty compelled, where failure due to abuse of discretion.

1. Section 871-38, General Code, which provides that any employer or other person in interest, being dissatisfied with an order of the Industrial Commission, may commence an action in the Supreme Court against the commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to an order allowing a claim for workmen's compensation under power conferred by Section 1465-90, General Code.

2. Prohibition will not issue to prevent the Industrial Commission from carying out a lawful award of workmen's compensation made to a claimant pursuant to Section 1465-90, General Code.

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*439

3. Mandamus will not lie to control the discretion of the Industrial Commission with respect to an award of compensation; but the writ will lie to compel the performance of a duty specially enjoined by law where failure to perform the duty results from abuse of discretion, violation of law or otherwise.

(No. 29746—Decided January 19, 1944)

Appeal from the Industrial Commission

A statement of the case appears in the opinion.

[fol. 58] Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for plaintiff,

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for defendant.

Williams, J. This proceeding is brought originally in this court by the Copperweld Steel Company, an employer complying with the workmen's compensation law. The real object sought by plaintiff is to bring about the disallowance of six claims, heretofore allowed by the Industrial Commission, to prevent the awards thereon from being taken into consideration in determining the merit rating to be applied to plaintiff's risk.

The defendant filed a motion to strike out various parts of the petition, but, in view of statements made by counsel in open court on the presentation of the motion, this court now treats the motion as a general demurrer.

It is not necessary to recite the allegations of the petition in full but only those well-pleaded and germane to this inquiry.

On November 13, 1941, six employees of the plaintiff left its industrial plant near the city of Warren, Ohio, after they had finished their work, entered an automobile and proceeded not less than 700 feet along the roadway to a railway grade crossing where the automobile collided with a freight train. In the collision two of the employees were killed and four injured. As a result thereof two claims for death benefits and four for compensation for injuries were filed with and allowed by the Industrial Commission. After the allowances had been made, the employer, plaintiff herein, filed with the commission a petition as to each claim seeking a vacation of the order of allowance and a dis-

allowance of the claim. The petitions were denied and thereupon this suit was instituted.

* It does not affirmatively appear from the petition whether the employees had other means of egress from the grounds surrounding the plant or whether they had left the zone of their employment. Allegations of such character would be material on the question of compensability, yet as will be pointed out it is immaterial for the purpose of this case whether these claims are in law compensable or not.

The relief sought by plaintiff is rather sweeping. In the prayer of the petition plaintiff asks: (1) That the "orders of the Industrial Commission be set aside, vacated and reversed; that the * * * claims and each of them be disallowed; (2) that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's workmen's compensation risk, and requiring the defendant to vacate such orders and disallow such claims; and (3) for all such further relief to which the plaintiff may be entitled."

[fol. 59] Counsel for plaintiff in their brief and in argument assert that plaintiff is entitled to: (1) a review of the orders of the commission, pursuant to Section 871-38, General Code; or (2) a writ to set aside the orders and compel their disallowance.

The extent to which appeals from orders of the Industrial Commission upon claims for compensation or death benefits may be allowed is provided for in Section 1465-90, General Code. When on rehearing a claim is denied on any ground or grounds specified in that section the claimant is given a right of appeal by filing a petition in the Court of Common Pleas. On the other hand when the claim is allowed the action is final. In that event the complying employer cannot appeal from the order of allowance and the employee * cannot appeal from an order fixing the amount of compensation.

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Does plaintiff have a remedy by review under Section 871-38, General Code?

That section insofar as material herein reads thus: "Any employer or other person in interest being dissatisfied with any order of the commission may commence an action in the Supreme Court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the Supreme Court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The commission shall be served with summons as in other civil cases."

Counsel for plaintiff request re-examination of our previous construction of that provision. It was early held that an employee could not bring a proceeding under that section for the allowance of compensation in addition to that which had previously been allowed. Gatton v. Industrial Commission, 93 Ohio St., 203, 112 N. E., 503. Recently it was decided that an employer has no right to have an order, fixing a premium rate, reviewed under this provision. United States Wall Paper Co. v. Industrial Commission, 132 Ohio St., 372, 7 N. E. (2d), 798. Since the decision in the Gatton case there have been many other decisions construing this section. It is now the established rule that its provisions do not confer upon this court power to review orders of the Industrial Commission allowing claims for injury or death arising out of or suffered in the course of employment but apply only to matters pertaining to the safety code. Orders reviewable thereunder are such as "relate to places of employment and to safeguards touching the life, health, and safety of employees." Pittsburgh Coal Co. v. Industrial Commission, 108 Ohio St., 185, 188, 140 N. E., 684. United *States Wall Paper Co. v. Industrial Commission, supra. In the two latter reported cases citations to other decisions may be found. Upon re-examination of the question we approve and follow the established rule that orders made by the Industrial Commission under the workmen's compensation law are not reviewable under Section 871-38, General Code.

Is the plaintiff entitled to a writ compelling the setting aside of the awards and disallowance of the claims?

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The plaintiff in its petition has not indicated exactly what kind of a writ is sought. It might be either injunction, prohibition or mandamus. Plaintiff's counsel do not specifically urge that injunction will lie but do ask for a writ "enjoining the defendant." Therefore, we give passing consideration to the applicability of the injunctive remedy. This court has power to grant an injunction pendente lite as ancillary to a cause of which it has jurisdiction, in order [fol. 60] to preserve matters in statu quo. However, as to chancery cases in which an injunction is sought as a final remedy, original jurisdiction is vested by statute in the Court of Common Pleas. The Supreme Court has, under the Constitution, no original jurisdiction to afford such relief in chancery.

Counsel for plaintiff do contend that this action is "in prohibition." Prohibition is a remedy calculated to keep inferior tribunals from usurping power with which they have not been invested. It must be borne in mind that it is not sought herein to prevent a merit rating of a complying employer as was the case in State, ex rel. Powhatan Mining Co., v. Industrial Commission, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, but to control the action of the Industrial Commission with respect to the allowance or disallowance of certain claims. The power to hear claims and award death benefits and compensation for injuries has been *expressly conferred upon the commission by Section 1465-90, General Code, and prohibition will not lie to curb the exercise of that power or to prevent the enforcement of a valid award after it has been made upon claims properly before it, as were the claims in the case at bar.

Do facts pleaded state a cause of action in mandamus? Mandamus is frequently employed to keep the Industrial Commission within legal bounds. The writ's use is limited to compelling the performance of a duty specially enjoined by law whether the failure to perform the duty results from an abuse of discretion, a violation of law, or otherwise.

The complying employer has no direct financial interest in the distribution of the state insurance fund. His interest lies in basic and merit ratings and the amount he is required to pay in premiums. With respect to the subject matter involved in a proceeding upon a claimant's application for

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* 444.

compensation under Section 1465-90 General Code, the complying employer's interest is remote. He is neither a necessary nor proper party to such a proceeding; not being a party he has no right to appeal or review. The lack of such right, however, does not deprive him of relief through the extraordinary legal remedy of mandamus, when warranted by the facts.

It has previously been stated that it is inconsequential whether the petition alleges facts to show that the claims were in reality compensable. Upon what theory can every complying employer, upon the allowance of a claim by the Industrial Commission, sue out a writ in this court and try the issue of compensability over again? Were this court to issue a writ compelling the Industrial Commission to set aside orders allowing the claims and to enter orders of disallowance, the claimant's right to a rehearing before the commission would be cut off by a prior adjudication in this court. See *State ex rel Nichols v. Gregory et al., Industrial Commission, 130 Ohio St., 165 169, 198 N. E., 182. Thus the result of allowing the writ would be to deny to claimants, who are not parties here, the right to proceed under the express provision of Section 1465-90, General Code, with respect to the determination of their claims. The power to determine compensability is vested in the commission and cannot be interfered with as long as its discretion is exercised soundly and within legal bounds.

Now, the petition does not set up any abuse of discretion on the part of the commission or aver any facts to show that the orders of the commission were void for fraud or [fol. 61] otherwise, or invalid by reason of any statutory provision. No case is made out by the allegations of the petition which would show a right to relief by mandamus.

Since the allegations of the petition do not show a right to a review under Section 871-38, General Code, or a right to a writ as prayed for or other relief, the petition is subject to a general demurrer.

Petition held demurrable.

Weygandt, C. J., Matthias, Hart, Zimmerman, Bell and Turner, JJ., concur.

[fol. 62] [File endorsement omitted.]

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* 445.

[fol. 63] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed Feb. 1, 1944.

Now comes the plaintiff and makes application for a rehearing, vacation of the entry of January 19, 1944, herein, and that the motion of defendant treated as a demurrer be overruled, for the reasons hereinafter set forth.

The opinion and entry herein state that the allegations of the petition do not show a right to review under General Code §871-38, or other relief; although the court has heretofore recognized that orders of the Commission awarding compensation are final only as to findings of fact and are subject to review where unlawful, unreasonable, discriminatory or arbitrary so as to amount to a gross abuse of discretion or deprive the plaintiff of property without due process of law.

> Slatmeyer v. Industrial Commission, 115 O. S. 654;
> Wallpaper Co. v. Industrial Commission, 132 O. S. 372, 376;
> State ex rel. Slaughter v. Industrial Commission, 132 O. S. 537, 542;
> Coal Co. v. Industrial Commission, 108 O. S. 185, 190.

[fol. 64] In argument upon the motion we have not gone into the merits of the claims for compensation but have confined ourselves to the question of the right of review. For that purpose the petition must be taken as true.

The petition alleges many facts showing that the employes involved in the claims herein had left the plant of the employer and were injured or killed by hazards not created or increased by the employment; that the hazards were in fact less than those to which others of the general public were subject at other crossings; as well as allegations that the injuries and deaths did not arise in the course of, or out of, the employment; that the employment had no casual relation thereto; that the findings and orders were not supported by any evidence but were contrary to the uncontroverted evidence, disregard sworn admissions of record, constitute a gross abuse of discretion, if any, and of the power and authority, of the defendant (contrary to the statement in the next to the last paragraph of the opinion),

are beyond the jurisdiction of defendant, deprive plaintiff of its property without due process and deny it the equal protection of the laws, etc.

The opinion erroneously states (142 O. S. 443) that it is not sought herein to prevent a merit rating of a complying employer—such is indeed the entire purpose of the suit unless an up-rating by the inclusion of unlawful and unreasonable awards in the premiums to be paid by plaintiff may not properly be described by the use of the word "merit."

Can it properly be said that "the complying employer has no direct financial interest in the distribution of the [fol. 65] state insurance fund" (142 O. S. 444) when the Commission in merit rating risks adds the entire amount of all awards distributed in excess of certain quite nominal reserves or allowances to the premiums charged over a five-year period? The employer's financial interest could not be much more direct.

The employer is not a party to proceedings under G. C. 1465-90, but these were not proceedings under that section; the employer was treated as a party before the Commission; and in this court the claimants are all listed as "Interested Parties." Certainly the protection of the Fourteenth Amendment to the Federal Constitution is not conditioned upon the existence of prior legal proceedings to which the person claiming protection was a necessary or proper, and actual formal party.

It is inaccurate to say that the claimant's right to a rehearing before the Commission would be cut off by a prior adjudication in this court if the employer were allowed a right of review of an order of the Commission awarding compensation. The right to rehearing would not be cut off although the result would be determined by the law of the case, just as that principle or the principle of *stare decisis* frequently dictates that a claim be denied, or that a verdict be directed in court. This is not a denial of due process nor does it excuse the denial of due process to the employer.

It is evident from the facts shown that the employes had other means of egress from the grounds surrounding the plant and that they had left the zone of employment. That [fol. 66] of course is a conclusion of law from the facts shown and we are seeking an opportunity to justify that conclusion in a hearing on the merits. Likewise the record

will show that there were other *ways* of egress used by some employes. However, we carefully and expressly limited our argument to the question of the right of review in the interest of orderly procedure and fair coverage of the question involved. Upon a hearing on the merits we are confident of our ability to show that the allowance of the claims involved an extension of the zone of employment theory beyond the farthest limits to which the courts have gone and beyond any justification in the reason for the rules, indeed contrary to the reasoning in the decided cases. The circumstances here are such that the existence of other means, or even ways, of egress is a relatively minor factor.

We submit that the plaintiff is entitled to have the orders of the Commission submitted to the test of reasonableness and lawfulness, which the entry of this court has denied in violation of plaintiff's constitutional rights.

Respectfully submitted, Robert G. Day, Attorney for Plaintiff.

Copies of the foregoing application have been mailed to all counsel for the defendant and for the interested parties January 31, 1944.

Robert G. Day, Attorney for Plaintiff.

[fol. 67] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

AMENDMENT TO PETITION—Filed Feb. 28, 1944

Now comes the plaintiff, Copperweld Steel Company, and by leave of Court to file this amendment to its petition herein incorporates by reference all of the allegations of its petition as though fully repeated herein, and further says that:

At the time of the collision out of which the injuries and deaths resulting in the claims involved herein arose, the men so injured and deceased were traveling to their homes by means freely chosen by them; other means of egress and other ways of egress from the plant of the employer were available to them and were customarily used by other employes of the plaintiff.

The collision, out of which the injuries and deaths resulting in the claims involved herein arose, did not occur during the time or in the place or zone of employment of the injured or deceased men or any of them; nor was such employment the direct or proximate cause thereof.

The defendant, The Industrial Commission of Ohio, has fixed and maintains a manual of basic ("Manual") rates [fol. 68] of premiums charged by it and collected from employers contributing to the State Insurance Fund for various classes of occupations and has likewise established formulae for the merit rating of contributing employers under which such employers by favorable accident experience become entitled to a credit against the basic or manual rates or by unfavorable accident experience become subject to additional penalty charges. The premiums charged to the plaintiff for Workmen's Compensation are assessed upon the basis of such manual rates, principally under Manual 3015, so-called, covering employes in rolling mills.

During the five-year period ended December 31, 1942, (in which the plaintiff was engaged in rolling mill operations only from and after October 21, 1939) the payroll of the plaintiff covered by Manual 3015 aggregated $10,082,517 and that of all employers in the State of Ohio contributing under Manual 3015 was only $11,214,000. The premiums paid by the plaintiff during such period under Manual 3015 aggregated $60,939.00 and those paid by all employers in the State of Ohio under Manual 3015 aggregated only $83,900.00. Consequently, the experience of the plaintiff in the matter of claims affects not only its merit rating but the basic rate under Manual 3015 as well, and is dominant in the determination of such rates. During the first half of the year 1943 the basic rate fixed by the defendant under Manual 3015 was 80¢ for each hundred dollars of payroll of employers covered thereby, but such rate was revised, effective July 1, 1943, to one dollar per hundred dollars of payroll, largely by reason of the claims [fol. 69] involved herein. The accident experience of plaintiff was such that, except for the claims involved herein, the plaintiff would have been entitled to a merit rating credit of 26% of the basic rates established for the last half of the year 1943 in reduction of the basic rates under all operating manuals (i.e., for all classifications except clerical office and traveling salesmen) for the entire

year; but by reason of such claims such merit rating credit was eliminated, the plaintiff was charged and it paid the basic rates for the year 1943, or an aggregate increase in premium of $20,018.62 over what the premium would have been without such claims, and disregarding the effect of such claims in the 25% increase in basic manual rate. Unless the orders of The Industrial Commission in the claims involved herein are vacated and set aside and the defendant required to eliminate them from consideration in determination of premiums to be charged against the plaintiff under the rules and formulae established by the Commission for the fixing of premuims and merit rating, the plaintiff will be charged with large additional amounts by way of increased rates, the exact amount of which is impossible of present determination. The plaintiff therefore has a direct financial interest, to the extent of $20,018.62 plus the amount of all additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims involved herein and the distribution of the State Insurance Fund on account thereof.

[fol. 70] Unless this Court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws.

Wherefore, plaintiff prays judgment as in its petition set forth.

Robert G. Day, Second National Bldg., Warren, Ohio; E. P. McHugh, Jr., Republic Building, Cleveland, Ohio, Attorneys for Plaintiff.

Duly sworn to by Robert G. Day; jurat omitted in printing.

[fol. 71] [File endorsement omitted.]

[fols. 72-103] IN THE SUPREME COURT OF OHIO

[Title omitted]

DEMURRER—Filed March 13, 1944

Comes now the defendant, The Industrial Commission of Ohio, and demurs to plaintiff's petition and amendment to petition on the following grounds:

1. The petition and the amendment to the petition do not state facts sufficient to constitute a cause of action.

2. The petition and the amendment to the petition improperly join several causes of action.

Thomas J. Herbert, Attorney General; Robert E. Hall, Asst. Attorney General, Attorneys for Deft.

[Brief in support of foregoing demurrer omitted in printing.]

[fol. 104] IN SUPREME COURT OF OHIO

OPINION ON FINAL JUDGMENT

(143 O. S. 591)

Workmen's compensation—Due process or equal protection not denied employer—No statutory right to review order awarding compensation—Employer contending claims not compensable and merit rating affected—Not entitled to relief by extraordinary legal remedy.

1. An employer is not denied due process of law or equal protection of the law by reason of the fact that he is not given a right by statute to review an order of the industrial Commission awarding workmen's compensation to his employees or dependents of his deceased employees.

2. When such an order is challenged only on the ground that the claims allowed are not compensable, the employer whose merit rating will be affected thereby is not entitled to relief by way of extraordinary legal remedy.

(No. 29746—Decided July 19, 1944)

Appeal From the Industrial Commission

On Demurrer to Petition and Amendment to Petition

The facts are stated in the opinion.

[fol. 105] Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for appellant.

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for appellees.

WILLIAMS, J.:

The petition in this case was held demurrable in Copperweld Steel Co. v. Industrial Commission, 142 Ohio St., 439, 52 N.E. (2d), 735, and the substance of the allegations in that pleading may be found in the opinion. Subsequently the plaintiff filed an amendment to the petition. The controlling question is whether the petition and amendment thereto when considered together are subject to a general demurrer. The amendment sets out that at the time of the collision out of which the injuries and deaths resulting in the claims herein arose, the employees, injured and killed in such collision, were traveling to their homes by means freely chosen by themselves, and that other means of egress from the plant of the employer were available to them and were customarily used by other employees of the plaintiff; that the collision did not occur during the time or in the place or zone of their employment; and that in any event the employment was not the direct cause of the injuries and deaths. In addition, the amendment sets out many evidential facts and figures tending to show how the merit rating of the plaintiff has been and will be affected by the allowance of the claims arising from the injury and death of the employees in such collision. The amendment then states that "by reason of such claims such merit rating credit was eliminated, the plaintiff was charged and it paid the basic rates for the year 1943, or an aggregate increase in premium of $20,018.62 over what the premium would have been without such claims, and disregarding the effect of such claims in the 25% increase in basic manual rate."

The amendment concludes with these averments: "The plaintiff therefore has a direct financial interest, to the extent of $20,018.62 plus the amount of all additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims involved herein and the distribution of the state insurance fund on account thereof.

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"Unless this court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws.

"Wherefore, plaintiff prays judgment as in its petition set forth."

* Counsel for plaintiff in their brief in opposition to the demurrer make this statement:

[fol. 106] "It was not sought by the amendment to inject a constitutional question, but to set forth beyond cavil the facts from which it is clear that, unless this court review the decisions below, the plaintiff will have been deprived of its property without due process of law and will have been denied the equal protection of the law. This court has clearly and repeatedly held that the decisions of the Industrial Commission are final only upon questions of fact, and to deny a review of questions of law involved in such decisions would be unconstitutional."

It is plain that the plaintiff challenges only the "decisions" of the commission with respect to the compensability of the claims in question. A full discussion of the problem, however, requires us to consider in a measure the question of merit rating under Section 1465-54, paragraph 3 (formerly paragraph 4) General Code.

In State, ex rel, Williams, v. Industrial Commission, 116 Ohio St., 45, 156 N. E., 101, three members of this court voted to sustain the constitutionality of Section 1465-75, General Code, which as then in force provided inter alia for the payment of compensation out of the surplus fund, and four members dissented on the ground that the statute insofar as that provision was concerned, amounted to a denial of due process. Since the votes of six judges are necessary under the Ohio Constitution to declare a law unconstitutional in a cause originating in this court, the statutory provision under consideration was held valid. Since the opinion has no syllabus, Rule VI (see note 94, Ohio St., ix) has no application and the concurring judges are deemed to endorse the pronouncements of law as in a per curiam

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opinion. With respect to due process, the *language of Judge Jones at page 55, is appropriate here:

"Finally, as a controlling reason why the claim of the employer, that its property is taken without due process, cannot be sustained, is the concession that the state insurance fund does not belong to the employer. Such being the fact, due process is not available to the employer, for his property is not taken. The employer, having paid his premium to the state, has acquired not only insurance, but has also obtained immunity from suit—has obtained his quid pro quo—meanwhile the fund is held in trust by the state, solely for the benefit of injured workmen and their dependents."

In State, ex rel. Powhatan Mining Co., v. Industrial Commission, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, a writ of prohibition was sought to prohibit imposing upon the relator a premium rate calculated upon merit and predicated on individual experience. Judge Jones in the opinion used this language, making special reference to the equal protection clause:

"Section 1465-54, paragraph 4 (which provided for merit rating), in our opinion, does no violence either to the federal or state Constitutions by authorizing the commission to apply to individual occupations 'that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk most equitably, predicated upon the basis of its individual industrial accident experience, and to encourage and stimulate accident prevention.' Such a classification is neither unreasonable nor arbitrary; and we think its basis is fully sustained by state and federal courts. * * *

" 'A classification having some reasonable basis does not offend against that clause (the equal protection clause) merely because it is not made with mathematical nicety, or because in practice it results in some inequality.' "

[fol. 107] In considering the question of due process and equal* protection of the laws it is necessary to have in mind that a complying employer is not a necessary or a proper party to the proceeding under Section 1465-90, Gen-

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eral Code, for the allowance of compensation. That statute does not provide for his being brought in. His only direct financial interest is, not in the distribution of the fund or in the fund itself, but in the creation of it, that is, in the amount of premiums he pays in the future. Since he has no such interest in the fund or its distribution and is not even a proper party to the proceeding, he is not denied a constitutional right by the allowance of a claim for compensation. He is not aggrieved, if at all, until the commission applies "that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience and to encourage and stimulate accident prevention," pursuant to Section 1465-54, paragraph 3 (formerly paragraph 4), General Code. When action is taken in merit rating, which determines the amount of premium an employer is required to pay, then for the first time his financial interest is affected. True, Section 1465-54, paragraph 3 and kindred sections are silent as to recourse to the courts by an employer in matters relating to merit rating; but since paragraph 3 (formerly 4) has been held constitutional by this court (State, ex rel. Powhatan Mining Co., v. Industrial Commission, supra), and the plaintiff makes no direct attack on its provisions, or on the action of the commission as to merit rating, no further consideration need be given to the question of the constitutionality of such provision.

It is stated in the opinion on the demurrer to the petition (Copperweld Steel Co. v. Industrial Commission, supra) that it is immaterial for the purposes of this case whether the injuries and deaths were compensable or not. It may be remarked in this connec*tion that the facts alleged do not show that the orders of the commission in allowing the claims for compensation were absolutely void but could be at the most merely what is denominated erroneous in judicial procedure. As heretofore indicated, such orders cannot be reviewed by this court at the suit of the employer who was not a party to the proceedings brought by the claimants, and the facts pleaded in the petition and amendment thereto do not entitle the plaintiff herein to relief by way of extraordinary legal remedy.

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This court has not overlooked Section 1465-75, General Code, which provides inter alia for proceedings against the complying employer who defaults "in any payment required to be made by him or it to the state insurance fund." The plaintiff could refuse to pay a premium assessed against it and upon suit to recover the same, make its defense, if any it has. That section has no application to the present case.

The pertinent question which the plaintiff makes other than those regarding constitutionality were fully discussed in the previous opinion in this case and what was there said is applicable here.

For the reasons given, the demurrer to the petition and amendment thereto is sustained, and final judgment entered in favor of the defendant.

Judgment for defendant.

Weygandt, C. J., Natthias, Zimmerman and Turner, JJ., Concur.

Hart and Bell, JJ. dissent.

[fol. 108] DISSENTING OPINION

BELL, J., dissenting:

In stating the reasons for my dissent I shall briefly review this cause from its inception.

The allegations of the original petition call to the attention of the court that the plaintiff, a corporation, *is operating an industrial plant near the city of Warren, Ohio, and is an employer contributing to the State Insurance Fund and otherwise fully complying with the workmen's compensation law of Ohio. On November 12, 1941, among the workmen employed by plaintiff were Isidoros Diomataris, Leonidas Serres, Costas Perris, Markos Mamoujelos, Antionos Spanolios and Tom Russ.

On the night of that day these six men worked at the plant and on the next morning after they had finished they left the plant and entered an automobile driven by Isidoros Diomataris.

They proceeded some distance over a roadway to a grade crossing on land owned by the Baltimore & Ohio Railroad Company at which time and place the automobile and a freight train proceeding over the crossing came into colli-

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sion causing the death of the first two named employees and injuring the remaining four.

A claim was filed by or on behalf of each of such employees with the Industrial Commission (hereinafter called the commission) and on June 11, 1943, the commission entered an order in each cause finding that the claimant was entitled to participate in the State Insurance Fund. Plaintiff was notified of the findings and orders and thereafter filed a petition with the commission for rehearing and reconsideration of the claims and orders. Upon rehearing the commission again entered its orders allowing the claims. The plaintiff alleges in detail the facts with reference to the collision between the automobile and the train, and also reasons why the claims should have been rejected.

The prayer, in brief, is that the orders be set aside, vacated and reversed and that the claims be disallowed, that a writ issue prohibiting and enjoining the commission from continuing such orders in effect or making payments thereunder and from taking into consideration any payments made thereunder in the merit *or individual rating of the plaintiff's workmen's compensation risk.

To this petition the commission (defendant) filed a general demurrer.

In *Copperweld Steel Co.* v. *Industrial Commission*, 142 Ohio St., 439, by a unanimous decision, this court held that the petition was demurrable upon the ground that the Workmen's Compensation Act does not grant the employer the right to review of an order made by the commission awarding compensation to an injured employee.

Thereafter plaintiff filed an amendment to the petition in which it is alleged that the commission assessed and the plaintiff paid for the year 1943 an aggregate increase in premium of $20,182.62 over the amount the premium would have been without such claims and that plaintiff will be charged with additional amounts by way of increased premiums in future years based upon the allowance of such claims.

[fol. 109] The commission again has demurred upon two grounds, (1) that the petition and the amendment thereto do not state facts sufficient to constitute a cause of action, and (2) that several causes of action are improperly joined.

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The majority of the court has concluded that the demurrer to the petition and the amendment should be sustained and the petition dismissed.

With that conclusion I am unable to agree.

Under the provisions of the Workmen's Compensation Act every employer who employs three or more persons regularly in the same business is amenable to the act and complying employers are protected against actions at law for damages for death or injury to employees sustained in the course of their employment. The employee is guaranteed compensation for any injury sustained in the course of and arising out of his employment and the dependents of an employee, in *case death ensues, under like circumstances are granted compensation. The act further provides that employers amenable thereto, with the approval of the commission, may become self-insurers. All employers, therefore, who employ three or more persons regularly in the same business, of necessity fall within one of three classifications. (1) Complying employers; (2) non-complying employers; or (3) self-insurers. The first class pays premiums into the State Insurance Fund, the latter two classes do not.

The commission fixes the amount of the premium that complying employers must pay into the fund based upon the classification of the business and the amount of losses incurred against the fund on account of injuries and death of the employees of such employer. It follows that the greater the number of compensable deaths or injuries occurring during any one year the greater the amount of premiums payable by the employer.

In my view of this case two constitutional questions must be considered. (1) Is the complying employer being deprived of his property without due process of law? (2) Is the complying employer being granted the equal protection of the law?

Let us briefly analyze what happens to each class of employers when an employee is killed or injured.

Class No. 1 Complying Employers—Where an employee of a complying employer is killed or injured claim is made to the commission and if an award is granted compensation is paid out of the State Insurance Fund. The employer

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has no voice in the matter. There is no forum wherein such complying employer can set up the defense that the injury or death did not occur in or arise out of the employment even though that be the fact.

By the provisions of the statute every award granted by the commission results in an increase in the *premium which the complying employer must pay for the ensuing years. [fol. 110] The net result is that whether an award is rightfully or wrongfully made the complying employer cannot be heard to complain.

Class No. 2 Non-complying Employers—Where an employee of a non-complying employer is killed or injured the employee or in case of death his dependents have a choice of remedies. A civil action may be maintained for such death or injury against such employer or application may be made to the commission, and it may make an award and certify the same to the Attorney General who shall institute a civil action against such employer to compel payment. However, in either event, the non-complying employer may defend any action brought against him upon the ground that the death or injury did not occur in the course of or arise out of the employment. If such defense be established the non-complying employer is not required to pay for the death or injury of such employee.

Class No. 3 Self-Insurers.—When an employee of such self-insurer is killed or injured, application is filed with the commission by the injured employee or by his dependents in case death ensues and, if an award is granted, the employer, if an action be instituted to compel payment of the award, may defend upon the ground that the death or injury did not occur in or arise out of the employment.

It is self-evident that the non-complying and self-insuring employers before being compelled to pay any award or damages have the legal right to have determined the question as to whether the injury or death occurred in or arose out of the employment. The complying employer has no such right. This court has held frequently that a complying employer has no right to review an order of the commission awarding compensation.

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* 600.

* It is a matter of such common knowledge that judicial notice should be taken of the fact that the commission considers thousands of claims each year and like all human agencies undoubtedly it makes mistakes. In some cases claims are allowed that should be rejected and some persons are compensated who should not receive compensation. In cases where awards are erroneously granted by the commission it is neither just nor equitable that the complying employer be required to pay extra premiums on account thereof. Requiring such payments results in penalizing the complying employer by placing him upon a different basis than the self-insurer or the non-complying employer.

In this case the court goes a step further and decides, in effect, that even though the employer is compelled to pay large sums of money in additional premiums for a period of years by reason of erroneous awards of compensation made by the commission, still the complying employer cannot maintain an action to prohibit the commission from assessing and collecting such additional premiums.

If the complying employer has no remedy the assessment and collection of premiums based upon awards granted by the commission to a claimant not entitled thereto amounts to the taking of such employer's property without due process of law.

[fol. 111] This court has never squarely decided whether the complying employer has a remedy. It would seem from one statement in the majority opinion that the remedy of the complying employer under such circumstances is to refuse to pay the premium assessed by the commission and when suit is instituted to collect such premium the complying employer may make a defense if he has one.

If that be his exclusive remedy then in my judgment the complying employer is not afforded the equal protection of the law.*

* Section 1465-75, General Code, provides in part:

"If any employer who has complied with this act shall default in any payment required to be made by him or it to the state insurance fund for a period of ten days after notice that such payment is due, the same proceedings may

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* 601.

* 602.

be had as in the case of an employer against whom the commission has made a finding as hereinbefore provided."

Without quoting in detail all the provisions of the statute, suffice it to say that after the commission has determined the amount owed to the fund and notified the employer thereof such amount so determined shall be paid within ten days and upon failure so to do the commission shall certify the finding to the Attorney General who shall "forthwith institute a civil action against the employer." Such employer is granted ten days to answer and to execute a bond *in double the amount claimed*, with sureties satisfactory to the commission, conditioned that he or it will pay any judgment and costs rendered against him or it for such premiums and upon failure to give such bond it becomes the mandatory duty of the court to appoint a receiver to take charge of the employer's business.

If the employer is relegated to that remedy his cause is lost as soon as suit is instituted for the reason that he could not claim that he did not owe at least a part of the assessed premium.

In the majority opinion it is said that Section 1465-75, General Code, has no application to the present case. If the complying employer in this case had refused to pay the premium as fixed by the commission and an action had been instituted to require the payment thereof that section by its very language would certainly be applicable.

In addition thereto if the employer had failed to pay the premium the corporation, its president, secretary, general manager or managing agent, each would be personally subject to fine and imprisonment (Section 1465-69a, General Code) and the corporation if sued by some injured employee during the period of non-compliance would be barred of all common-law defenses. To require the complying employer to undergo those hazards in order to review the correctness of an award made by the commission, none of which is required of a self-insurer, does not afford the complying employer equal protection of the law, nor does it afford him a remedy in the ordinary course of the law.

The functions of the commission in granting awards to claimants and in fixing premium ratings are *quasi*-judicial. We have held upon numerous occasions that a writ of prohi- [fols. 112-113] bition is the appropriate remedy to keep administration tribunals within the limits of their jurisdic-

tion. See *State, ex rel. Arey v. Sherrill, City Manager*, 142 Ohio St., 574, 53 N. E. (2d), 501, and cases cited therein.

In the instant case all of the facts being admitted by the demurrer, upon those admitted facts, the commission was without jurisdiction or authority to grant any award of compensation to any of the six claimants and after having done so, it was without jurisdiction or authority to consider such awards in fixing the premium for the ensuing years thereby increasing such premiums.

In my opinion the petition and the amendment thereto state facts sufficient to entitle the plaintiff to relief by this court if the allegations thereof be sustained by proof.

As to the second ground of the demurrer all of the claims grew out of one accident and the allowance of those claims was the basis of the increase in the amount of premiums, and therefore there is no misjoinder of causes of action.

The demurrer therefore should be overruled.

Hart, J., Concurs in the foregoing dissenting opinion."

[fol. 114] Bond on Appeal for $1,000.00 approved and filed October 13, 1944, omitted in printing.

[fols. 115-117] [File endorsement omitted]

[fol. 118] IN THE SUPREME COURT OF OHIO

[Title omitted]

PETITION FOR APPEAL—Filed October 13, 1944

To the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of the State of Ohio:

Now comes the appellant, Copperweld Steel Company, a corporation, and for its petition for appeal to the Supreme Court of the United States, respectfully shows that:

On the 19th day of July, 1944, final judgment was rendered in the above entitled cause by the Supreme Court of the State of Ohio, the highest Court in said state, against appellant, Plaintiff therein, and in favor of the Industrial Commission of Ohio, Defendant therein, sustaining a demurrer of the Defendant to the petition and amendment

thereto and entering final judgment in favor of the Defendant.

In this suit there was drawn in question the validity of a statute of the State of Ohio commonly known as the Workmen's Compensation Act set forth in the General Code ("G. C.") §§ 1465-37 to 1465-112 inclusive, providing among [fol. 119] other things that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries or death of employees shall be final, except that claimants may appeal from denial of such claims on grounds stated therein (G. C. § 1465-90; 120 O. L., S. 159, § 1).

The Workmen's Compensation Act further provides:

(a) For the creation of a state liability board of awards (G. C. § 1465-37) superseded by the Industrial Commission of Ohio (G. C. § 871-12; 103 O. L. 97, § 12);

(b) For the classification by the Industrial Commission of occupations or industries with respect to hazards, the determination of risks and fixing of rates of premium for the different classes, based on payroll or such other basis as the Commission may determine, to provide and maintain a state insurance fund adequate for workmen's compensation provided in the act (G. C. § 1465-53);

(c) For the fixing of rates of premium, to provide a solvent state insurance fund and surplus and granting the Industrial Commission power to apply that form of rating system in its judgment best calculated to merit or individually rate the risk more equitably, predicated upon the basis of individual industrial accident experience (G. C. § 1465-54);

(d) For the compulsory payment semi-annually by employers subject to the Act of premiums for workmen's compensation determined by the classifications, rules and rates made and published by the Commission, except as to those employers who qualify and elect to pay compensation direct and are only required to pay such portion of the premiums otherwise payable as are required to be credited to the surplus (G. C. § 1465-69);

(e) That employers complying with the act shall not be liable for damages at common law or by statute for

injuries or deaths of employes occurring during the period covered by the premiums paid or qualification for self-insurance (G. C. § 1465-70);

(f) For payment from the state insurance fund or by self-insuring employers direct to employes injured in the course of, and arising out of, their employment [fol. 120] and to their dependents in case death has ensued (G. C. § 1465-68, 1465-72);

(g) That any employe whose employer has failed to comply with the act who has been injured in the course of employment, or his dependents in case of death, may file application for and be awarded compensation; that any employe of a self-insuring employer may, in event of failure of his employer to pay compensation, file application with like effect; and for collection of any award in either case by civil action instituted by the attorney general of the state (G. C. § 1465-74). The Supreme Court of Ohio has construed this section of the statute as permitting non-complying and self-insuring employers to contest the validity of any such award on any legal ground (including the ground that the injury or death did not arise in the course or out of the employment) by way of defense in the action for collection of such awards;

(h) That if any employer who has complied with the Act shall default in any required payment to the state insurance fund for a period of ten days after notice that payment is due, the Commission shall certify its finding to the Attorney General who shall forthwith institute a civil action against the employer and unless the employer within ten days execute bond to the state in double the amount claimed, the Court shall appoint a receiver of the employer's business (G. C. § 1465-75); the corporation, its president, secretary, general manager or managing agent will be personally subject to fine and imprisonment (G. C. § 1465-69 a) and the corporation, in case of injury to an employe or ensuing death is not entitled to the benefits of the Act but may be sued, and in such case, barred of the common law defenses of the fellow-servant rule, assumption of risk, and contributory negligence (G. C. § 1465-73).

Likewise there were drawn in question in this suit the right, privilege and immunity of appellant under §1 of the Fourteenth Amendment to the Federal Constitution that it be not deprived of its property without due process of law nor denied the equal protection of the laws, by any action of the State.

By its decision and judgment aforesaid the Supreme Court of Ohio held that the Workmen's Compensation Act is valid and not repugnant to Section 1 of the Fourteenth [fol. 121] Amendment to the Federal Constitution and that the appellant was not deprived of its property without due process of law or denied the equal protection of the laws by such statute, the orders of the Industrial Commission, or the action of this Court, although:

(a) The Supreme Court of Ohio thereby held that appellant is not entitled to judicial hearing upon, review of, prohibition or other relief against six several orders of the Industrial Commission of Ohio awarding workmen's compensation payable from the state insurance fund on account of injuries and deaths of employes of appellant, an employer contributing to the state insurance fund under the Workmen's Compensation Act of Ohio, which orders and awards were unreasonable and unlawful and were entered in gross abuse of discretion, if any, and of the power and authority of the Industrial Commission and were beyond its jurisdiction, for the reason that the injuries and deaths involved were not occasioned in the course of, and did not arise out of, the employment and were, therefore, not compensable; the findings of the Commission to the contrary not being supported by any evidence but being contrary to the uncontroverted evidence before the Commission.

(b) Appellant will be charged and required to pay over a period of five years large additional amounts by way of increased premiums for workmen's compensation, the exact amount of which is presently impossible of ascertainment but aggregated $20,018.62 for the year 1943, by the inclusion of such claims in the basis of computation of the premium rates charged the appellant, and thereby the appellant has been and will be deprived of its property without due process of law.

(c) The Supreme Court of Ohio has repeatedly held that orders of the Industrial Commission awarding workmen's compensation are reviewable, or subject to attack upon any legal ground, e. g. that the injury was not occasioned in the course of or did not arise out of the employment, where the award is not payable from the state insurance fund, by defense in a suit (under G. C. § 1465-74) for collection of the award in the case of (1) self-insured employers, (2) non-complying employers and (3) employers against whom additional awards are made for injuries, disease or death because of the failure of compliance with a lawful safety [fol. 122] requirement; and appellant has, therefore, been denied the equal protection of the laws.

Appellant presents herewith an Assignment of Errors and a Statement in Support of Jurisdiction on appeal.

Appellant has heretofore procured an order staying and suspending execution of the judgment of this Court and of orders of the Industrial Commission involved therein until October 19, 1944 and thereafter until any application for certiorari and any appeal be determined by the Supreme Court of the United States, and has filed and procured approval of a bond in the penal sum of $1,000.00 therefor.

Wherefore, appellant prays the allowance of an appeal from the judgment of the Supreme Court of the State of Ohio to the Supreme Court of the United States; that the appeal operate as a supersedeas without additional bond; that the record be removed to the Supreme Court of the United States; that the errors complained of be reviewed and corrected; that the judgment be reversed; and for such other relief as may be proper in the premises.

Robert G. Day, Attorney for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford, of Counsel.

[fol. 123] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 13, 1944

Copperweld Steel Company, appellant herein, assigns the following errors in the record and proceedings of the Supreme Court of Ohio in said case:

(1) The Court erred in holding valid and not repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution the provision of the Workmen's Compensation Act (G. C. § 1465-90) that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries and deaths of employes shall be final except that claimants may appeal from denial of such claims on grounds stated therein;

(2) The Court erred in holding that §871-38 of the General Code of Ohio, providing that any employer or other person in interest being dissatisfied with any order of the Industrial Commission may commence an action in the Supreme Court against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to orders allowing claims for workmen's compensation under § 1465-90 of the General Code;

(3) The Court erred in holding that when an order of the Industrial Commission awarding workmen's compensation is challenged on the ground that the injuries or death for which claims are allowed are not compensable, employers contributing to the state insurance fund, whose premiums will be increased thereby, are not entitled to relief by way of extraordinary remedy;

[fol. 124] (4) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not deprived of property without due process of law by the court's construction and application of G. C. §§ 1465-90 and 871-38, and by its holding that appellant is not entitled to judicial hearing on, review of, prohibition, mandamus or other relief against such orders; although under the rules and system adopted

by the Commission for the classification of occupations and industries and the determination of risks and rates, the premiums charged and required to be paid by appellant for workmen's compensation over a period of five years will be thereby greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943;

(5) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not denied the equal protection of the laws by the denial of any judicial hearing on, review of, prohibition, mandamus or other relief against orders of the Industrial Commission awarding workmen's compensation for injuries and deaths which are not legally compensable; although employers against whom awards are made for the payment of workmen's compensation otherwise than from the state insurance fund (self-insuring employers and employers who in violation of law are non-complying) may attack the legality of such orders by setting up any defense other than a question of fact in a suit for the collection of such awards under the Workmen's Compensation Act (G. C. § 1465-74);

(6) The Court erred in holding that the appellant has no direct financial interest in the distribution of the state insurance fund, although by the allowance of claims for injuries and deaths which are not compensable and the payment of such awards from the state insurance fund, premiums charged and required to be paid by appellant for workmen's compensation will be greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943.

(7) The Court erred in its final judgment of July 19, 1944 sustaining the general demurrer to the petition and amendment thereto and entering judgment for the appellee;

(8) The State of Ohio, by the Workmen's Compensation Act, the decision and judgments of the Court, and the orders of the Commission involved herein, has [fol. 125] deprived appellant of property without due

process of law and has denied it the equal protection of the laws.

Wherefore, appellant prays that the judgment of the Supreme Court of Ohio be reversed; that judgment be rendered in favor of appellant; and for such other relief as may be proper in the premises.

Robert G. Day, Attorney for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford, of counsel.

[fol. 126] IN THE SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 13, 1944

This day this cause came on to be heard upon the petition of Copperweld Steel Company, plaintiff and appellant, for appeal to the Supreme Court of the United States from the final judgment entered in the above entitled suit by the Supreme Court of the State of Ohio on July 19, 1944 and upon the assignments of error and jurisdictional statement filed therewith; and upon consideration thereof it is Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio as prayed for in said petition; that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record and proceedings in the above entitled suit and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

And the appellant having heretofore presented to a Judge of this Court its notice of appeal and application [fol. 127] for stay of execution and having procured an order staying and suspending execution and enforcement of the judgment of this Court and of the orders of the Industrial Commission involved in this cause for a period of three months following July 19, 1944 and thereafter until an applicatoin for certiorari and any appeal be determined by the Supreme Court of the United States;

and having filed and procured approval by a Judge of this Court of a bond therefor in the penal sum of $1,000.00 with Fidelity and Deposit Company of Maryland as surety which bond is sufficient for costs and supersedeas on this appeal, it is Ordered that such bond be and it is hereby accepted, approved and continued in effect as though now for the first time presented, accepted and approved; and that the appeal herein shall operate as a supersedeas and suspension of the judgment of this Court and of the orders of the Industrial Commission involved in this cause until this appeal and any application for a writ of certeriorari be determined by the Supreme Court of the United States.

Dated Oct. 13, 1944.

Carl V. Weygandt, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 128] Citation in usual form showing service on Thomas J. Herbert, filed Oct. 17, 1944, omitted in printing.

[fol. 129] IN THE SUPREME COURT OF OHIO, JANUARY TERM, 1943

29746

Title of Case

COPPERWELD STEEL COMPANY, Warren, Ohio

vs.

THE INDUSTRIAL COMMISSION OF OHIO, Consisting of Will T. Blake, James A. White, and G. L. Coffinberry

Action: Appeal from The Industrial Commission of Ohio

Attorneys: Robert G. Day, Second Nat'l. Bank Bldg., Warren, Ohio; E. P. McHugh, Jr., Republic Bldg., Cleveland, Ohio; Thomas J. Herbert, Attorney General.

Memoranda of Pleadings, &c filed, Writs Issued, &c.

DOCKET ENTRIES

Sept. 4, 1943	Petition in prohibition with praecipe for summons filed.
Sept. 4, 1943	Summons in Prohibition issued to Sheriff of Franklin County, service to be made on defendant, sent by registered mail and returnable Sept. 13, 1943. (Rec. #23080)
Sept. 15, 1943	Summons in prohibition returned and filed endorsed: "Received this Writ Sept. 7, 1943 at 9:00 o'clock A. M. and pursuant to its command on the 8th day of September, 1943, I served the within named The Industrial Commission of the State of Ohio, by serving Will T. Blake, Chairman of said The Industrial Commission of the State of Ohio, by personally handing to him a true and cer- [fol. 130] tified copy of this writ with all the endorsements thereon. Jacob E. Sandusky, Sheriff of Franklin County, Ohio. L. Hurd, Deputy. Sheriff's Fees $1.17.

Sept. 30, 1943	Application for extension of time to plead herein filed.
Sept. 30, 1943	Entry extending time for pleading herein to October 30, 1943. J 37—275
Oct. 29, 1943	Motion by defendant to strike and brief in support of motion filed.
Nov. 5, 1943	Proof of Service filed.
Nov. 12, 1943	Leave to file plaintiff's brief on or before Nov. 27, 1943 filed.
Nov. 27, 1943	Printed brief of plaintiff opposing motion to strike and proof of service filed.
Jan. 19, 1944	Motion by defendant to strike out various parts from petition. Petition held demurrable. Twenty days allowed to plead further. J 37—368
Feb. 1, 1944	Application for rehearing filed.
Feb. 9, 1944	Rehearing denied. Twenty days allowed to plead from this date. J 37—386
Feb. 28, 1944	Amendment to petition filed.
March 13, 1944	Demurrer to Amendment to Petition and brief in support of demurrer filed.
March 16, 1944	Proof of Service filed.
March 28, 1944	Entry extending time for filing plaintiff's brief opposing demurrer herein to April 11, 1944. J 37—422
March 30, 1944	Proof of Service of demurrer and brief filed.
March 31, 1944	Printed brief opposing demurrer filed and proof of service filed.
[fol. 131]	
July 19, 1944	Demurrer to petition and amendment thereto sustained and final judgment for defendants. J 37—498
July 26, 1944	Certified copy of entry sent to Industrial Commission.
Aug. 7, 1944	Notice of Appeal and application for stay of Execution filed.
Aug. 7, 1944	Entry granting application for stay of execution upon giving bond in the sum of $1,000.00. J 37—511
Aug. 7, 1944	Bond in sum of $1,000.00, Fidelity & Deposit Co. of Maryland, as Surety, approved and filed.

Oct. 13, 1944	Petition for appeal filed.
Oct. 13, 1944	Order allowing appeal filed.
Oct. 13, 1944	Assignments of Error filed.
Oct. 13, 1944	Statement of appellant in support of jurisdiction in United States Supreme Court filed.
Oct. 13, 1944	Citation issued.
Oct. 13, 1944	Bond in sum of $1000.00 Fidelity & Deposit Co. of Maryland, as surety, approved and filed.
Oct. 17, 1944	Citation returned and filed.
Oct. 17, 1944	Proof of service as required by Rule 12, Paragraph 3, filed.
Oct. 17, 1944	Stipulation for Transcript of Record filed.
Oct. 30, 1944	Statement Opposing Jurisdiction and Motion to Dismiss or Affirm filed.
Nov. 6, 1944	Proof of Service of Statement Opposing Jurisdiction filed.

[fol. 132] IN SUPREME COURT OF OHIO

Journal Entries

ORDER SUSTAINING MOTION TREATED AS DEMURRER TO PETITION

29746

Wednesday, January 19, 1944.

Motion by appellee to strike from the petition in Prohibition.

Appeal from The Industrial Commission.

This cause came on to be heard upon the motion of defendant to strike out various parts from the petition and was argued by counsel. On consideration whereof it appearing that the allegations of the petition do not show a right to review under Section 871-38, General Code or a right to a writ as prayed for, or other relief, the motion filed by the defendant to strike out various parts of the petition is now treated as a demurrer to the petition and it is ordered and adjudged that said demurrer be, and

the same hereby is sustained for the reasons stated in the opinion rendered in this case.

It is further ordered that plaintiff be allowed twenty days to plead further. J 37—368

ORDER DENYING APPLICATION FOR REHEARING

29746

Wednesday, February 9, 1944.

Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. Plaintiff allowed twenty days to plead from this date. J 37—386

[fols. 133-134] FINAL JUDGMENT

29746

Wednesday, July 19, 1944.

Appeal from The Industrial Commission.

This cause came on to be heard upon the demurrer to the petition and the amendment thereto filed originally in this Court, and was argued by counsel. On consideration whereof, it is ordered by the Court that said demurrer be and the same hereby is sustained for the reasons stated in the opinion rendered in this case. And the plaintiff herein, Copperweld Steel Company, not desiring to plead further it is ordered and adjudged that final judgment be, and the same hereby is, rendered in favor of defendant, The Industrial Commission of Ohio.

It is further ordered that the plaintiff pay the costs herein, taxed at $—.

Ordered, That a copy of this entry be certified to The Industrial Commision of Ohio. J 37—498

[fol. 135] Clerk's Certificate to foregoing entries omitted in printing.

[fol. 136] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed October 17, 1944

It is hereby stipulated and agreed by and between the parties by their counsel that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record and proceedings herein to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, and shall include therein the following (showing date of filing or entry in each case):

Petition and Statement of Interested Parties and Counsel.
Motion to Strike and Brief in Support of Motion.
Brief in Opposition to Motion to Strike.
Opinion of the Court rendered January 19, 1944.
Journal Entry of January 19, 1944, Sustaining (Journal Entries). Motion Treated as a Demurrer.
Application for Rehearing.
Journal Entry of February 9, 1944, Overruling Application for Rehearing (Journal Entries).
Amendment to Petition.
Demurrer to Petition and Amendment and Brief in Support of Demurrer.
Brief in Opposition to Demurrer.
Opinions of the Court rendered July 19, 1944 (both majority and dissenting).
Journal Entry of July 19, 1944, Sustaining Demurrer and Entering Final Judgment (Journal Entries).
[fol. 137] Notice of Appeal and Application for Stay of Execution.
Journal Entry Granting Stay of Execution (Journal Entries).
Bond with approvals endorsed thereon (the Power of Attorney of J. R. Warner, Attorney-in-Fact, may be omitted).
Petition for Appeal.
Assignment of Errors.
Statement in Support of Jurisdiction.
Order Allowing Appeal.

Original Citation on Appeal and Acknowledgment of Service.

Service and Notice under Rule 12, Paragraph 3, with Acknowledgment of Service.

Transcript of Docket Entries with dates thereof, other than those to be omitted as stated below.

This Stipulation.

Your Certificate.

The following may be omitted:

Precipe for Summons, Summons and Return of Service.

All motions and applications for extension of leave to plead or of time for filing briefs, and separate entries thereon.

Notices and Proofs of Service (except as otherwise specifically designated or required).

Verifications.

Unnecessary repetition of captions and other formal parts.

Dated October 16, 1944.

Robert G. Day, Attorney for Plaintiff. Thomas J. Herbert, Attorney General. Robert E. Hall, Assistant Attorney General; Attorneys for Defendant.

[fols. 138-139] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 140] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Nov. 29, 1944

Appellant states that it adopts its Assignment of Errors as its statement of points to be relied upon in this court, to the same extent as though fully repeated herein.

Appellant further designates the parts of the record listed below, which it thinks necessary for the consideration of the points relied upon, to-wit:

1. Petition.
2. Motion to Strike.
3. Opinion Rendered January 19, 1944.
4. Journal Entry of January 19, 1944, sustaining Motion treated as a Demurrer.

5. Application for Rehearing.
6. Journal Entry of February 9, 1944, Overruling Application for Rehearing.
7. Amendment to Petition.
8. Demurrer to Petition and Amendment.
9. Opinions Rendered July 19, 1944 (both Majority and Dissenting).
[fol. 141] 10. Journal Entry of July 19, 1944, Sustaining Demurrer and Entering Final Judgment.
11. Notice of Appeal and Application for Stay of Execution.
12. Journal Entry Granting Stay of Execution.
13. Petition for Appeal.
14. Assignment of Errors.
15. Statement in Support of Jurisdiction.
16. Order Allowing Appeal.
17. Citation on Appeal and Acknowledgment of Service.
18. Service and Notice under Rule 12, Paragraph 3.
19. Transcript of Docket Entries (with dates thereof).
20. Stipulation for Transcript of Record.
21. Certificates of the Clerk of the Supreme Court of Ohio.
22. This Statement and Designation.

Robert G. Day, Henry H. Hoppe, Attorneys for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford, Of Counsel.

[fol. 142] Acknowledgment of Service

Service and receipt of a copy of the foregoing Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed is hereby acknowledged this 24 day of November, 1944.

Thomas J. Herbert, Attorney General; Robert E. Hall, Assistant Attorney General, Attorneys for Appellees.

[fol. 142a] [File endorsement omitted.]

[fol. 143] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—January 2, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits.

Endorsed on Cover: File No. 49137. Ohio Supreme Court, Term No. 684. Copperweld Steel Company, Appellant, vs. Industrial Commission of Ohio. Filed November 15, 1944. Term No. 684 O. T. 1944.

(3)

FILED
NOV 15 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 684

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT IN SUPPORT OF JURISDICTION

ROBERT G. DAY,
Counsel for Appellant.

FRANK R. S. KAPLAN,
E. P. MCHUGH, JR.,
HOPPE, DAY & FORD,
Of Counsel.

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STATUTES CITED

General Code of Ohio, Section 871-38 5,10
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Section 350 4
Section 861a 1,11
Workmen's Compensation Act of Ohio (General Code of Ohio, Sections 1465-37 to 1465-112, inclusive) .. 2

IN THE SUPREME COURT OF OHIO

No. 29,746

COPPERWELD STEEL COMPANY,
Plaintiff.

vs.

INDUSTRIAL COMMISSION OF OHIO,
Defendant

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, Copperweld Steel Company, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

Statutory Provisions Conferring Jurisdiction

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, §§ 344(a) and 861 a of the United States Code.

Statute of the State, the Validity of Which Is Involved Herein

The statute of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio, the highest Court of such State, as not being repugnant to the Constitution of the United States is the Work-

men's Compensation Act set forth in the General Code of Ohio ("G. C.") §§ 1465-37 to 1465-112, inclusive, providing among other things that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries or death of employees shall be final, except that claimants may appeal from denial of such claims on any of the grounds specified therein (G. C. § 1465-90; 120 O. L., S. 159, § 1); and further providing:

(a) For the creation of a state liability board of awards (G. C. § 1465-37), superseded by the Industrial Commission of Ohio (G. C. § 871-12; 103 O. L. 97, § 12);

(b) For the classification by the Industrial Commission of occupations or industries with respect to hazards, the determination of risks and fixing of rates of premium for the different classes, based on payroll or such other basis as the Commission may determine, to provide and maintain a state insurance fund adequate for workmen's compensation provided in the act (G. C. § 1465-53);

(c) For the fixing of rates of premium, to provide a solvent state insurance fund and surplus and granting the Industrial Commission power to apply that form of rating system in its judgment best calculated to merit or individually rate the risk more equitably, predicated upon the basis of individual industrial accident experience (G. C. § 1465-54);

(d) For the compulsory payment semi-annually by employers subject to the Act of premiums for workmen's compensation determined by the classifications, rules and rates made and published by the Commission, except as to those employers who qualify and elect to pay compensation direct and are only required to pay such portion of the premiums otherwise payable as are required to be credited to the surplus (G. C. §1465-69);

(e) That employers complying with the act shall not be liable for damages at common law or by statute for

injuries or deaths of employes occurring during the period covered by the premiums paid or qualification for self-insurance (G. C. §1465-70);

(f) For payment from the state insurance fund or by self-insuring employers direct to employes injured in the course of, and arising out of, their employment and to their dependents in case death has ensued (G. C. §1465-68, §1465-72);

(g) That any employe whose employer has failed to comply with the act who has been injured in the course of employment, or his dependents in case of death, may file application for and be awarded compensation; that any employe of a self-insuring employer may, in event of failure of his employer to pay compensation, file application with like effect; and for collection of any award in either case by civil action instituted by the attorney general of the state (G. C. §1465-74). The Supreme Court of Ohio has construed this section of the statute as permitting non-complying and self-insuring employers to contest the validity of any such award on any legal ground (including the ground that the injury or death did not arise in the course or out of the employment) by way of defense in the action for collection of such awards;

(h) That if any employer who has complied with the Act shall default in any required payment to the state insurance fund for a period of ten days after notice that payment is due, the Commission shall certify its finding to the Attorney General who shall forthwith institute a civil action against the employer and unless the employer within ten days execute bond to the state in double the amount claimed, the Court shall appoint a receiver of the employer's business (G. C. §1465-75); the corporation, its president, secretary, general manager or managing agent will be personally subject to fine and imprisonment (G. C. §1465-69 a) and the corporation, in case of injury to an employe or ensuing death is not entitled to the benefits of the Act but may be sued, and in such case, barred of the common law

defenses of the fellow-servant rule, assumption of risk, and contributory negligence (G. C. §1465-73).

Date of Judgment and Date of Application for Appeal

The date of the final judgment of the Supreme Court of Ohio, which is now sought to be reviewed, was July 19, 1944; the Petition for Appeal was presented herewith, within three months thereafter, as required by Title 28, §350 U. S. C.

Nature of the Case and Rulings of the Court

The case originated on petition filed by appellant in the Supreme Court of Ohio for relief against six certain orders of the Industrial Commission awarding workmen's compensation by reason of injuries and deaths of employes of appellant, alleging, inter al., that such injuries and deaths did not arise in the course or out of their employment; that the findings and orders of the Commission are unreasonable and unlawful in that they are not supported by any evidence but are contrary to the uncontroverted evidence before the Commission, are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, and are beyond the jurisdiction, of the Commission and would deprive the Plaintiff of its property without due process and deny it the equal protection of the laws.

In the petition appellant prayed that the orders of the Industrial Commission be set aside, vacated and reversed; that the claims and each of them be disallowed; that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the appellant's workmen's compensation risk, and requiring the defendant to vacate

such orders and disallow such claims; and for all such further relief to which the appellant may be entitled.

A motion to the petition was treated as a general demurrer (142 O. S. 439, 440) and sustained by the Court January 19, 1944. The Court in its opinion (142 O. S. 439) held (Syl. 1) that the provisions of G. C. § 871-38 that any employer or other person in interest, dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable and unlawful and vesting the Supreme Court with exclusive jurisdiction, does not apply to orders awarding workmen's compensation under G. C. § 1465-90; that such orders are final, and that prohibition (Syl. 2), mandamus (Syl. 3), or other relief was not available to appellant.

An application for rehearing was filed and denied.

The opinion of the Court indicated questions as to the meaning and sufficiency of certain allegations; therefore an amendment to the petition was filed alleging in greater detail the absence of facts essential to compensability, abuse of discretion on the part of the commission, direct financial interest of the Plaintiff in the distribution of the state insurance fund, and the extent of such interest, and of the deprivation of its property without due process.

A general demurrer to the petition and amendment was sustained and final judgment entered for defendant July 19, 1944, thereby leaving in effect the illegal orders of the Commission, unsupported by evidence and entered in excess of its jurisdiction.

From the opinions the position of the majority of the court is clearly that under the Workmen's Compensation Act the action of the Commission allowing claims is final (142 O. S. 439, 441); that appellant is not entitled to remedy by review or other relief and that appellant was not thereby

deprived of property without due process or denied the equal protection of the laws (143 O. S. 591) although the premiums required to be paid by it for workmen's compensation will be increased and although non-complying employers and self-insuring employers are in position to obtain review of awards of compensation which are similarly illegal, unreasonable, void and beyond the jurisdiction of the Commission. That the Act so construed deprives appellant of property without due process of law and denies it the equal protection of the law is clearly demonstrated in the dissenting opinion (143 O. S. 596) of Judges Bell and Hart.

Substantiality of Questions Involved

This case involves the denial of due process and equal protection of the laws by refusal of review or other remedy to an employer contributing to the state insurance fund against unlawful awards of workmen's compensation in claims for injuries and deaths which were not occasioned in the course of or by the employment and therefore are not compensable, particularly in comparison with self-insuring and non-complying employers as well as claimants, all of whom are afforded a review or other means of testing the legality of the orders of the Commission.

The resulting unlawful increase in the premiums charged appellant over a period of five years will be substantial, having already developed to the extent of $20,018.62 in the year 1943.

The particular question presented—the denial of hearing on questions of law—is novel. On such questions the workmen's compensation acts generally afford some form of review. Substantiality of the questions involved is apparent when the precise question has not been passed on before.—*Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 476.

The Supreme Court of the United States has previously recognized the appealability of cases challenging the constitutionality of workmen's compensation laws according finality to decisions of the administrative tribunal on questions of fact; but the laws involved in those cases provided for review or appeal on legal grounds and they were held constitutional. *Hawkins* v. *Bleakly*, 243, U. S. 210; *Booth Fisheries Co.* v. *Industrial Com. of Wis.*, 271 U. S. 208.

The Supreme Court of Ohio has likewise previously recognized that denial of review other than on questions of fact would be unconstitutional.—*Coal Co.* v. *Industrial Com.*, 108 O. S. 185, 190; *Slatmeyer* v. *Industrial Com.*, 115 O. S. 654, 658; *State, ex rel., Slaughter* v. *Ind. Comm.*, 132 O. S. 537, 542.

Cases Supporting Jurisdiction

Administrative orders of a judicial or quasi-judicial nature are void if a judicial hearing is denied, if the hearing granted is manifestly unfair, if the finding is indisputably contrary to the evidence, if the facts found do not as a matter of law support the order made.—*Interstate Commerce Com.* v. *L. & N. R. R Co.*, 227 U. S. 88, 91; *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287; *The Chicago Junction Case*, 264 U. S. 258; 44 S. Ct. 317; *Northern Pac. Ry. Co.* v. *Dept of Public Works*, 268 U. S. 39. Appeal (or writ of error) was allowed in these cases.

An inquiry as to whether an order is reasonable and in conformity to law or whether it is supported by any evidence is judicial in character.—*Fed. Radio Com.* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266, 277; *Public Service Com.* v. *Havemeyer*, 296 U. S. 506.

Administrative orders unsupported by evidence showing the facts required by the statute as basis for the order are beyond the power or jurisdiction of the Commission.—*Hawkins* v. *Bleakly, supra; Waite* v. *Macy*, 246 U. S. 606;

Fed. Radio Com. v. *Nelson Bros. B. & M. Co., supra; Slatmeyer* v. *Industrial Com., supra; U. S.* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Crowell* v. *Benson*, 285 U. S. 22.

The question whether the injury or death arose in the course of employment is jurisdictional. *State, ex rel., Butram* v. *Ind. Com.*, 124 O. S. 589, 593; *State, ex rel., Randolph* v. *Ind. Com.*, 128 O. S. 27, 30; *Humphries* v. *Steel Corp.*, 132 O. S. 263, 270.

The right to judicial hearing or review upon questions essential to the jurisdiction of the Commission and the legality of an award, are recognized in *Fassig* v. *State, ex rel.*, 95 O. S. 232, 242; *Coal Co.* v. *Industrial Com.*, 108 O. S. 185, 190; *Clemmer & Johnson Co.* v. *Industrial Com.* 112 O. S. 421; *Slatmeyer* v. *Industrial Com.*, 115 O. S. 654, 656-658; *State, ex rel., Slaughter* v. *Industrial Com.*, 132 O. S. 537, 542; *Hawkins* v. *Bleakly, supra; Booth Fisheries Co.* v. *Industrial Com. of Wis.*, 271 U. S. 208. Appeal was allowed in the two cases last cited, involving Workmen's Compensation Acts.

Denial of due process will result from denial of judicial hearing or review. *Ohio Valley Water Co.* v. *Ben Avon, supra; Coal Co.* v. *Industrial Com., supra; Slatmeyer* v. *Industrial Com., supra.* This is true even though appellant have no legal interest in the state insurance fund and be not a necessary or proper party to the proceedings before the Industrial Commission since the operative effect of the act is to deprive it of property without due process. *Voeller* v. *Warehouse Co.*, 136 O. S. 427.

Likewise the equal protection of the laws is denied where others are afforded relief: *Coal Co.* v. *Industrial Com., supra; Smith* v. *Cahoon*, 283 U. S. 553; *Hawkins* v. *Bleakly, supra.*

To require that appellant default in payment of future premiums in order to test the validity of the awards included in computation thereof, foregoing the protection

of the act against suits at common law and subjecting itself and its officers to the other penalties of G. C. §§ 1465-69a, 1465-73, 1465-75 would deny due process. *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 661; *Santa Fe Pac. R. R.* v. *Lane*, 244 U. S. 492; *DeWitt* v. *State*, 108 O. S. 513, 533 (Opinion of five judges dissenting from prevailing opinion of two judges).

Stage at Which Federal Questions Raised

The Federal questions sought to be reviewed were first raised by the following allegations in the petition:

> "(e) The orders of the defendant are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, of the defendant and are beyond the jurisdiction of the defendant.
>
> "(f) The aforesaid orders of the Commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's Workmen's Compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess of those which should and may legally be charged and collected.
>
> "(g) The aforesaid orders of the Commission, unless vacated, prohibited or enjoined, will deprive the plaintiff of its property without due process of law and will deny it the equal protection of the law."

In the amendment to the petition, it was alleged that:

> "Unless this Court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws."

The Court clearly passed upon them as indicated by its opinions of January 19, 1944 and July 19, 1944. Both of

these decisions are based upon the finality accorded orders of the Commission by the Act (G. C. §1465-90) and upon the position that the contributing employer has no interest in the state insurance fund and is not a proper or necessary party to proceedings before the Commission. The opinion, in which two judges concurred, dissenting from the judgment of July 19, 1944 clearly demonstrates the effect of the Workmen's Compensation Act, the orders of the Industrial Commission, and the judgment in denying the appellant due process and the equal protection of the laws.

Opinions of the Court

Appended hereto are copies of the prevailing and dissenting opinions rendered by the Court in connection with the final judgment of July 19, 1944 and of the earlier opinion rendered in connection with the judgment of January 19, 1944.

Right to Certiorari

Independently of the right of appeal herein, the State of Ohio by the Workmen's Compensation Act, the orders of the Industrial Commission, and the decision and judgment of the court (including in addition to its construction of the Workmen's Compensation Act, its holding that G. C. §871-38 authorizing review is inapplicable and its denial of other remedy) have deprived appellant of property without due process of law and denied it the equal protection of the law—rights, privileges, and immunities guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution. Accordingly, if the appeal herein should be considered to have been improvidently taken, the Supreme Court of the United States should consider, and act upon, the papers as a petition for certiorari and as if presented to it at the time they were presented to the Supreme Court of Ohio, under U. S. C., Title 28, §344(c), and grant the relief prayed for.

Wherefore, the appellant, Copperweld Steel Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under Title 28, §§344 (a) and 861-a of the United States Code; but that if the appeal should be considered as having been improvidently taken, the Court consider it as an application for certiorari and that appellant be granted the relief prayed for in its petition for appeal and assignment of errors.

ROBERT G. DAY,
Attorney for Appellant.

Frank R. S. Kaplan, E. P. McHugh, Jr., Hoppe, Day & Ford of Counsel.

APPENDIX A

OPINIONS OF THE SUPREME COURT OF OHIO

Opinion Sustaining Motion Treated as Demurrer to Petition

(142 O. S. 439)

*Industrial Commission—Appeal to Supreme Court by employer or other party in interest—Section 871-38, General Code—Inapplicable to award of workmen's compensation—Prohibition—Writ not issued to prevent award of workmen's compensation—Mandamus—Discretion not controlled by writ—But performance of duty compelled, where failure due to abuse of discretion.

1. Section 871-38, General Code, which provides that any employer or other person in interest, being dissatisfied with an order of the Industrial Commission, may commence an action in the Supreme Court against the commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to an order allowing a claim for workmen's compensation under power conferred by Section 1465-90, General Code.

2. Prohibition will not issue to prevent the Industrial Commission from carrying out a lawful award of workmen's compensation made to a claimant pursuant to Section 1465-90, General Code.

3. Mandamus will not lie to control the discretion of the Industrial Commission with respect to an award of compensation; but the writ will lie to compel the performance of a duty specially enjoined by law where failure to perform the duty results from abuse of discretion, violation of law or otherwise.

(No. 29746—Decided January 19, 1944)

Appeal from the Industrial Commission.

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A statement of the case appears in the opinion.*

Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for plaintiff.

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for defendant.

Williams, J. This proceeding is brought originally in this court by the Copperweld Steel Company, an employer complying with the workmen's compensation law. The real object sought by plaintiff is to bring about the disallowance of six claims, heretofore allowed by the Industrial Commission, to prevent the awards thereon from being taken into consideration in determining the merit rating to be applied to plaintiff's risk.

The defendant filed a motion to strike out various parts of the petition, but, in view of statements made by counsel in open court on the presentation of the motion, this court now treats the motion as a general demurrer.

It is not necessary to recite the allegations of the petition in full but only those well-pleaded and germane to this inquiry.

On November 13, 1941, six employees of the plaintiff left its industrial plant near the city of Warren, Ohio, after they had finished their work, entered an automobile and proceeded not less than 700 feet along the roadway to a railway grade crossing where the automobile collided with a freight train. In the collision two of the employees were killed and four injured. As a result thereof two claims for death benefits and four for compensation for injuries were filed with and allowed by the Industrial Commission. After the allowances had been made, the employer, plaintiff herein, filed with the commission a petition as to each claim seeking a vacation of the order of allowance and a disallowance of the claim. The petitions were denied and thereupon this suit was instituted.

*It does not affirmatively appear from the petition whether the employees had other means of egress from the grounds surrounding the plant or whether they had

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left the zone of their employment. Allegations of such character would be material on the question of compensability, yet as will be pointed out it is immaterial for the purpose of this case whether those claims are in law compensable or not.

The relief sought by plaintiff is rather sweeping. In the prayer of the petition plaintiff asks: (1) That the "orders of the Industrial Commission be set aside, vacated and reversed; that the * * * claims and each of them be disallowed; (2) that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's workmen's compensation risk, and requiring the defendant to vacate such orders and disallow such claims; and (3) for all such further relief to which the plaintiff may be entitled."

Counsel for plaintiff in their brief and in argument assert that plaintiff is entitled to: (1) a review of the orders of the commission, pursuant to Section 871-38, General Code; or (2) a writ to set aside the orders and compel their disallowance.

The extent to which appeals from orders of the Industrial Commission upon claims for compensation or death benefits may be allowed is provided for in Section 1465-90, General Code. When on rehearing a claim is denied on any ground or grounds specified in that section the claimant is given a right of appeal by filing a petition in the Court of Common Pleas. On the other hand when the claim is allowed the action is final. In that event the complying employer cannot appeal from the order of allowance and the employee * cannot appeal from an order fixing the amount of compensation.

Does plaintiff have a remedy by review under Section 871-38, General Code?

That section insofar as material herein reads thus: "Any employer or other person in interest being dissatis-

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fied with any order of the commission may commence an action in the Supreme Court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the Supreme Court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The commission shall be served with summons as in other civil cases."

Counsel for plaintiff request re-examination of our previous construction of that provision. It was early held that an employee could not bring a proceeding under that section for the allowance of compensation in addition to that which had previously been allowed. Gatton v. Industrial Commission, 93 Ohio St., 203, 112 N. E., 503. Recently it was decided that an employer has no right to have an order, fixing a premium rate, reviewed under this provision. United States Wall Paper Co. v. Industrial Commission, 132 Ohio St., 372, 7 N. E. (2d), 798. Since the decision in the Gatton case there have been many other decisions construing this section. It is now the established rule that its provisions do not confer upon this court power to review orders of the Industrial Commission allowing claims for injury or death arising out of or suffered in the course of employment but apply only to matters pertaining to the safety code. Orders reviewable thereunder are such as "relate to places of employment and to safeguards touching the life, health, and safety of employees." Pittsburg Coal Co. v. Industrial Commission, 108 Ohio St., 185, 188, 140 N. E., 684. United *States Wall Paper Co. v. Industrial Commission, supra. In the two latter reported cases citations to other decisions may be found. Upon re-examination of the question we approve and follow the established rule that orders made by the Industrial Commission under the workmen's compensation law are not reviewable under Section 871-38, General Code.

Is the plaintiff entitled to a writ compelling the setting aside of the awards and disallowance of the claims?

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The plaintiff in its petition has not indicated exactly what kind of a writ is sought. It might be either injjunction, prohibition or mandamus. Plaintiff's counsel do not specifically urge that injunction will lie but do ask ffor a writ "enjoining the defendant." Therefore, we give ppassing consideration to the applicability of the injunctive remedy. This court has power to grant an injunction pendente lite as ancillary to a cause of which it has jjurisdiction, in order to preserve matters in statu quo. HHowever, as to chancery cases in which an injunction is sought as a final remedy, o iginal jurisdiction is vested by statute in the Court of Common Pleas. The Supreme Court has, under the Constitution, no original jurisdiction to affford such relief in chancery.

Counsel for plaintiff do contend that this action iss "in prohibition." Prohibition is a remedy calculated to keep inferior tribunals from usurping power with which they have not been invested. It must be borne in mind that it is not sought herein to prevent a merit rating of a compllying employer as was the case in State, ex rel. Powhatan Miining Co., v. Industrial Commission, 125 Ohio St., 272, 181 NN. E., 99, 82 A. L. R., 938, but to control the action of the Indusstrial Commission with respect to the allowance or disallowvance of certain claims. The power to hear claims and awward death benefits and compensation for injuries has been * expressly conferred upon the commission by Seection 1465-90, General Code, and prohibition will not lie to curb the exercise of that power or to prevent the enforcemernt of a valid award after it has been made upon claims propperly before it, as were the claims in the case at bar.

Do facts pleaded state a cause of action in mandammus? Mandamus is frequently employed to keep the Indusstrial Commission within legal bounds. The writ's use is limited to compelling the performance of a duty specially enjooined by law whether the failure to perform the duty results ffrom an abuse of discretion, a violation of law, or otherwisee.

The complying employer has no direct financial inteerest in the distribution of the state insurance fund. His inteerest

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lies in basic and merit ratings and the amount he is required to pay in premiums. With respect to the subject matter involved in a proceeding upon a claimant's application for compensation under Section 1465-90 General Code, the complying employer's interest is remote. He is neither a necessary nor proper party to such a proceeding; not being a party he has no right to appeal or review. The lack of such right, however, does not deprive him of relief through the extraordinary legal remedy of mandamus, when warranted by the facts.

It has previously been stated that it is inconsequential whether the petition alleges facts to show that the claims were in reality compensable. Upon what theory can every complying employer, upon the allowance of a claim by the Industrial Commission, sue out a writ in this court and try the issue of compensability over again? Were this court to issue a writ compelling the Industrial Commission to set aside orders allowing the claims and to enter orders of disallowance, the claimant's right to a rehearing before the commission would be cut off by a prior adjudication in this court. See * State ex rel. Nicholas v. Gregory et al., Industrial Commission, 130 Ohio St., 165, 169, 198 N. E., 182. Thus the result of allowing the writ would be to deny to claimants, who are not parties here, the right to proceed under the express provision of Section 1465-90, General Code, with respect to the determination of their claims. The power to determine compensability is vested in the commission and cannot be interfered with as long as its discretion is exercised soundly and within legal bounds.

Now, the petition does not set up any abuse of discretion on the part of the commission or aver any facts to show that the orders of the commission were void for fraud or otherwise, or invalid by reason of any statutory provision. No case is made out by the allegations of the petition which would show a right to relief by mandamus.

Since the allegations of the petition do not show a right to a review under Section 871-38, General Code, or a right

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to a writ as prayed for or other relief, the petition is subject to a general demurrer.

Petition held demurrable.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, BELL and TURNER, JJ., concur.

APPENDIX B

OPINIONS OF THE SUPREME COURT OF OHIO

On Final Judgment

(143 O. S. 591)

Workmen's compensation—Due process or equal protection not denied employer—No statutory right to review order awarding compensation—Employer contending claims not compensable and merit rating affected—Not entitled to relief by extraordinary legal remedy.

1. An employer is not denied due process of law or equal protection of the law by reason of the fact that he is not given a right by statute to review an order of the Industrial Commission awarding workmen's compensation to his employees or dependents of his deceased employees.

2. When such an order is challenged only on the ground that the claims allowed are not compensable, the employer whose merit rating will be affected thereby is not entitled to relief by way of extraordinary legal remedy.

(No. 29746—Decided July 19, 1944)

Appeal from the Industrial Commission

On Demurrer to Petition and Amendment to Petition

The facts are stated in the opinion.

Mr. Robert G. Day and Mr. E. P. McHugh, Jr., for appellant.

Mr. Thomas J. Herbert, attorney general, and Mr. Robert E. Hall, for appellees.

WILLIAMS, J.:

The petition in this case was held demurrable in Copperweld Steel Co. v. Industrial Commission, 142 Ohio St., 439, 52 N. E. (2d), 735, and the substance of the allegations in that pleading may be found in the opinion. Subsequently the plaintiff filed an amendment to the petition. The controlling question is whether the petition and amendment thereto when considered together are subject to a general de*murrer. The amendment sets out that at the time of the collision out of which the injuries and deaths resulting in the claims herein arose, the employees, injured and killed in such collision, were travelling to their homes by means freely chosen by themselves, and that other means of egress from the plant of the employer were available to them and were customarily used by other employees of the plaintiff; that the collision did not occur during the time or in the place or zone of their employment; and that in any event the employment was not the direct cause of the injuries and deaths. In addition, the amendment sets out many evidential facts and figures tending to show how the merit rating of the plaintiff has been and will be affected by the allowance of the claims arising from the injury and death of the employees in such collision. The amendment then states that "by reason of such claims such merit rating credit was eliminated, the plaintiff was charged and it paid the basic rates for the year 1943, or an aggregate increase in premium of $20,018.62 over what the premium would have been without such claims, and disregarding the effect of such claims in the 25% increase in basic manual rate."

The amendment concludes with these averments: "The plaintiff therefore has a direct financial interest, to the extent of $20,018.62 plus the amount of all additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims involved

* 592.

herein and the distribution of the state insurance fund on account thereof.

"Unless this court review and vacate, prohibit or enjoin the orders of the defendant or require the defendant to vacate and set the same aside this plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws.

"Wherefore, plaintiff prays judgment as in its petition set forth."

* Counsel for plaintiff in their brief in opposition to the demurrer make this statement:

"It was not sought by the amendment to inject a constitutional question, but to set forth beyond cavil the facts from which it is clear that, unless this court review the decisions below, the plaintiff will have been deprived of its property without due process of law and will have been denied the equal protection of the law. This court has clearly and repeatedly held that the decisions of the Industrial Commission are final only upon questions of fact, and to deny a review of questions of law involved in such decisions would be unconstitutional."

It is plain that the plaintiff challenges only the "decisions" of the commission with respect to the compensability of the claims in question. A full discussion of the problem, however, requires us to consider in a measure the question of merit rating under Section 1465-54, paragraph 3 (formerly paragraph 4) General Code.

In State, ex rel. Williams, v. Industrial Commission, 116 Ohio St., 45, 156 N. E., 101, three members of this court voted to sustain the constitutionality of Section 1465-75, General Code, which as then in force provided inter alia for the payment of compensation out of the surplus fund, and four members dissented on the ground that the statute insofar as that provision was concerned, amounted to a denial of due process. Since the votes of six judges are necessary under the Ohio Constitution to declare a law unconstitutional in a cause originating in this court, the statutory provision under consideration was held valid. Since

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the opinion has no syllabus, Rule VI (see note 94, Ohio St., ix) has no application and the concurring judges are deemed to endorse the pronouncements of law as in a per curiam opinion. With respect to due process, the * language of Judge Jones at page 55, is appropriate here:

"Finally, as a controlling reason why the claim of the employer, that its property is taken without due process, cannot be sustained, is the concession that the state insurance fund does not belong to the employer. Such being the fact, due process is not available to the employer, for his property is not taken. The employer, having paid his premium to the state, has acquired not only insurance, but has also obtained immunity from suit—has obtained his quid pro quo—meanwhile the fund is held in trust by the state solely for the benefit of injured workmen and their dependents."

In State, ex rel. Powhatan Mining Co. v. Industrial Commission, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, a writ of prohibition was sought to prohibit imposing upon the relator a premium rate calculated upon merit and predicated on individual experience. Judge Jones in the opinion used this language, making special reference to the equal protection clause:

"Section 1465-54, paragraph 4 (which provided for merit rating), in our opinion, does no violence either to the federal or state Constitutions by authorizing the commission to apply to individual occupations 'that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk most equitably, predicated upon the basis of its individual industrial accident experience, and to encourage and stimulate accident prevention.' Such a classification is neither unreasonable nor arbitrary; and we think its basis is fully sustained by state and federal courts. * * *

" 'A classification having some reasonable basis does not offend against that clause (the equal protection clause)

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* 594.

merely because it is not made with mathematical nicety, or because in practice it results in some inequality.' "

In considering the question of due process and equal *protection of the laws it is necessary to have in mind that a complying employer is not a necessary or a proper party to the proceeding under Section 1465-90, General Code, for the allowance of compensation. That statute does not provide for his being brought in. His only direct financial interest is, not in the distribution of the fund or in the fund itself, but in the creation of it, that is, in the amount of premiums he pays in the future. Since he has no such interest in the fund or its distribution and is not even a proper party to the proceeding, he is not denied a constitutional right by the allowance of a claim for compensation. He is not aggrieved, if at all, until the commission applies "that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience and to encourage and stimulate accident prevention," pursuant to Section 1465-54, paragraph 3 (formerly paragraph 4), General Code. When action is taken in merit rating, which determines the amount of premium an employer is required to pay, then for the first time his financial interest is affected. True, Section 1465-54, paragraph 3 and kindred sections are silent as to recourse to the courts by an employer in matters relating to merit rating; but since paragraph 3 (formerly 4) has been held constitutional by this court (State, ex rel. Powhatan Mining Co., v. Industrial Commission, supra), and the plaintiff makes no direct attack on its provisions, or on the action of the commission as to merit rating, no further consideration need be given to the question of the constitutionality of such provision.

It is stated in the opinion on the demurrer to the petition (Copperweld Steel Co. v. Industrial Commission, supra) that it is immaterial for the purposes of this case whether the injuries and deaths were compensable or not. It may be remarked in this connection that the facts alleged do not

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show that the orders of the commission in allowing the claims for compensation were absolutely void but could be at the most merely what is denominated erroneous in judicial procedure. As heretofore indicated, such orders cannot be reviewed by this court at the suit of the employer who was not a party to the proceedings brought by the claimants, and the facts pleaded in the petition and amendment thereto do not entitle the plaintiff herein to relief by way of extraordinary legal remedy.

This court has not overlooked Section 1465-75, General Code, which provides inter alia for proceedings against the complying employer who defaults "in any payment required to be made by him or it to the state insurance fund." The plaintiff could refuse to pay a premium assessed against it and upon suit to recover the same, make its defense, if any it has. That section has no application to the present case.

The pertinent questions which the plaintiff makes other than those regarding constitutionality were fully discussed in the previous opinion in this case and what was there said is applicable here.

For the reasons given, the demurrer to the petition and amendment thereto is sustained, and final judgment entered in favor of the defendant.

Judgment for Defendant.

WEYGANDT, C. J., MATTHIAS, ZIMMERMAN and TURNER, JJ., Concur. HART and BELL, JJ., Dissent.

BELL, J., dissenting. In stating the reasons for my dissent I shall briefly review this cause from its inception.

The allegations of the original petition call to the attention of the court that the plaintiff, a corporation, * is operating an industrial plant near the city of Warren, Ohio, and is an employer contributing to the State Insurance Fund and otherwise fully complying with the workmen's compensation law of Ohio. On November 12, 1941, among the workmen employed by plaintiff were Isidoros Diamataris, Leonidas Serres, Costas Perris, Markos Mamoujelos, Antionos Spanolios and Tom Russ.

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* 597.

On the night of that day these six men worked at the plant and on the next morning after they had finished they left the plant and entered an automobile driven by Isidoros Diomataris.

They proceeded some distance over a roadway to a grade crossing on land owned by the Baltimore & Ohio Railroad Company at which time and place the automobile and a freight train proceeding over the crossing came into collision causing the death of the first two named employees and injuring the remaining four.

A claim was filed by or on behalf of each of such employees with the Industrial Commission (hereinafter called the commission) and on June 11, 1943, the commission entered an order in each cause finding that the claimant was entitled to participate in the State Insurance Fund. Plaintiff was notified of the findings and orders and thereafter filed a petition with the commission for rehearing and reconsideration of the claims and orders. Upon rehearing the commission again entered its orders allowing the claims. The plaintiff alleges in detail the facts with reference to the collision between the automobile and the train, and also reasons why the claims should have been rejected.

The prayer, in brief, is that the orders be set aside, vacated and reversed and that the claims be disallowed, that a writ issue prohibiting and enjoining the commission from continuing such orders in effect or making payments thereunder and from taking into consideration any payments made thereunder in the merit * or individual rating of the plaintiff's workmen's compensation risk.

To this petition the commission (defendant) filed a general demurrer.

In *Copperweld Steel Co.* v. *Industrial Commission*, 142 Ohio St., 439, by a unanimous decision, this court held that the petition was demurrable upon the ground that the Workmen's Compensation Act does not grant the employer the right to a review of an order made by the commission awarding compensation to an injured employee.

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* 598.

Thereafter plaintiff filed an amendment to the petition in which it is alleged that the commission assessed and the plaintiff paid for the year 1943 an aggregate increase in premium of $20,182.62 over the amount the premium would have been without such claims and that plaintiff will be charged with additional amounts by way of increased premiums in future years based upon the allowance of such claims.

The commission again has demurred upon two grounds, (1) that the petition and the amendment thereto do not state facts sufficient to constitute a cause of action, and (2) that several causes of action are improperly joined.

The majority of the court has concluded that the demurrer to the petition and the amendment should be sustained and the petition dismissed.

With that conclusion I am unable to agree.

Under the provisions of the Workmen's Compensation Act every employer who employs three or more persons regularly in the same business is amenable to the act and complying employers are protected against actions at law for damages for death or injury to employees sustained in the course of their employment. The employee is guaranteed compensation for any injury sustained in the course of and arising out of his employment and the dependents of an employee, in * case death ensues, under like circumstances are granted compensation. The act further provides that employers amenable thereto, with the approval of the commission, may become self-insurers. All employers, therefore, who employ three or more persons regularly in the same business, of necessity fall within one of three classifications. (1) Complying employers; (2) noncomplying employers; or (3) self-insurers. The first class pays premiums into the State Insurance Fund, the latter two classes do not.

The commission fixes the amount of the premium that complying employers must pay into the fund based upon the classification of the business and the amount of losses incurred against the fund on account of injuries and death

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of the employees of such employer. It follows that the greater the number of compensable deaths or injuries occurring during any one year the greater the amount of premiums payable by the employer.

In my view of this case two constitutional questions must be considered. (1) Is the complying employer being deprived of his property without due process of law? (2) Is the complying employer being granted the equal protection of the law?

Let us briefly analyze what happens to each class of employers when an employee is killed or injured.

Class No. 1 Complying Employers—Where an employee of a complying employer is killed or injured claim is made to the commission and if an award is granted compensation is paid out of the State Insurance Fund. The employer has no voice in the matter. There is no forum wherein such complying employer can set up the defense that the injury or death did not occur in or arise out of the employment even though that be the fact.

By the provisions of the statute every award granted by the commission results in an increase in the * premium which the complying employer must pay for the ensuing years.

The net result is that whether an award is rightfully or wrongfully made the complying employer cannot be heard to complain.

Class No. 2 Non-complying Employer.—Where an employee of a non-complying employer is killed or injured the employee or in case of death his dependents have a choice of remedies. A civil action may be maintained for such death or injury against such employer or application may be made to the commission, and it may make an award and certify the same to the Attorney General who shall institute a civil action against such employer to compel payment. However, in either event, the non-complying employer may defend any action brought against him upon the ground that the death or injury did not occur in the course of or arise out of the employment. If such defense

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be established the non-complying employer is not required to pay for the death or injury of such employee.

Class No. 3 Self-insurers.—When an employee of such self-insurer is killed or injured, application is filed with the commission by the injured employee or by his dependents in case death ensues and, if an award is granted, the employer, if an action be instituted to compel payment of the award, may defend upon the ground that the death or injury did not occur in or arise out of the employment.

It is self evident that the non-complying and the self-insuring employers before being compelled to pay any award or damages have the legal right to have determined the question as to whether the injury or death occurred in or arose out of the employment. The complying employer has no such right. This court has held frequently that a complying employer has no right to review an order of the commission awarding compensation.

* It is a matter of such common knowledge that judicial notice should be taken of the fact that the commission considers thousands of claims each year and like all human agencies undoubtedly it makes mistakes. In some cases claims are allowed that should be rejected and some persons are compensated who should not receive compensation. In cases where awards are erroneously granted by the commission it is neither just nor equitable that the complying employer be required to pay extra premiums on account thereof. Requiring such payments results in penalizing the complying employer by placing him upon a different basis than the self-insurer or the non-complying employer.

In this case the court goes a step further and decides, in effect, that even though the employer is compelled to pay large sums of money in additional premiums for a period of years by reason of erroneous awards of compensation made by the commission, still the complying employer cannot maintain an action to prohibit the commission from assessing and collecting such additional premiums.

If the complying employer has no remedy the assessment and collection of premiums based upon awards granted by

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the commission to a claimant not entitled thereto amounts to the taking of such employer's property without due process of law.

This court has never squarely decided whether the complying employer has a remedy. It would seem from one statement in the majority opinion that the remedy of the complying employer under such circumstances is to refuse to pay the premium assessed by the commission and when suit is instituted to collect such premium the complying employer may make a defense if he has one.

If that be his exclusive remedy then in my judgment the complying employer is not afforded the equal protection of the law.*

Without quoting in detail all the provisions of the statute, suffice it to say that after the commission has determined the amount owed to the fund and notified the employer thereof such amount so determined shall be paid within ten days and upon failure so to do the commission shall certify the finding to the Attorney General who shall "forthwith institute a civil action against the employer." Such employer is granted ten days to answer and to execute a bond *in double the amount claimed,* with sureties satisfactory to the commission, conditioned that he or it will pay any judgment and costs rendered against him or it for such premiums and upon failure to give such bond it becomes the mandatory duty of the court to appoint a receiver to take charge of the employer's business.

If the employer is relegated to that remedy his cause is lost as soon as suit is instituted for the reason that he could not claim that he did not owe at least a part of the assessed premium.

In the majority opinion it is said that Section 1465-75, General Code, has no application to the present case. If

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* Section 1465-75, General Code, provides in part:

"If any employer who has complied with this act shall default in any payment required to be made by him or it to the state insurance fund for a period of ten days after notice that such payment is due, the same proceedings may be had as in the case of an employer against whom the commission has made a finding as hereinbefore provided."

the complying employer in this case had refused to pay the premium as fixed by the commission and an action had been instituted to require the payment thereof that section by its very language would certainly be applicable.

In addition thereto if the employer had failed to pay the premium the corporation, its president, secretary, general manager or managing agent, each would be personally subject to fine and imprisonment (Section 1465-69a, General Code) and the corporation if sued by some injured employee during the period of non-compliance would be barred of all common-law defenses. To require the complying employer to undergo those hazards in order to review the correctness of an award made by the commission, none of which is required of a self-insurer, does not afford the complying employer equal protection of the law, nor does it afford him a remedy in the ordinary course of the law.

The functions of the commission in granting awards to claimants and in fixing premium ratings are *quasi*-judicial. We have held upon numerous occasions that a writ of prohibition is the appropriate remedy to keep administrative tribunals within the limits of their jurisdiction. See *State, ex rel. Arey, v. Sherrill, City Manager*, 142 Ohio St., 574, 53 N. E. (2d), 501, and cases cited therein.

In the instant case all of the facts being admitted by the demurrer, upon those admitted facts, the commission was without jurisdiction or authority to grant any award of compensation to any of the six claimants and after having done so, it was without jurisdiction or authority to consider such awards in fixing the premium for the ensuing years thereby increasing such premiums.

In my opinion the petition and the amendment thereto state facts sufficient to entitle the plaintiff to relief by this court if the allegations thereof be sustained by proof.

As to the second ground of the demurrer all of the claims grow out of one accident and the allowance of those claims was the basis of the increase in the amount of premiums, and therefore there is no misjoinder of causes of action.

The demurrer therefore should be overruled.

HART, J., concurs in the foregoing dissenting opinion."

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(4)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 684

COPPERWELD STEEL COMPANY,
Appellant

v.

THE INDUSTRIAL COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 684

COPPERWELD STEEL COMPANY,
Appellant

v.

THE INDUSTRIAL COMMISSION OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Statement Opposing Jurisdiction

May It Please the Court:

The appellee, in opposing the jurisdiction of this court to review the above entitled cause, on appeal, respectfully represents:

I

The question of constitutionality was not properly raised in the Supreme Court of Ohio.

(A) Appellant challenged only the "decisions" of the appellee with respect to compensability of the claims in question.

(See opinion of Supreme Court of Ohio, attached as appendix to appellant's statement in support of juris-

diction of the Supreme Court of the United States; reported in 143 Ohio State 591.)

Live Oak Water Users' Association v. *Railroad Commission*, 269 U. S. 354, 358-59;
Ohio ex rel. Squire v. *Brown*, 312 U. S. 652.

(B) Appellant did not draw into question the validity of Section 1465-54, paragraph 3, General Code of Ohio.

State of Ohio, ex rel. Williams v. *Industrial Commission*, 116 Ohio State, 45.
State of Ohio, ex rel. Powhatan Mining Company v. *Industrial Commission*, 125 Ohio State 272.

II

The essence of the question involved in the appeal relates merely to procedure and remedy.

Louisville & Nashville Rd. v. *Schmidt*, 177 U. S., 230, 236;
Holmes v. *Conway*, 241 U. S., 624, 631-632;
Insurance Co. v. *Glidden*, 284 U. S., 151-158;
Snyder v. *Massachusetts*, 291 U. S., 97, 105;
Radium Dial Co. v. *Ryan*, 308 U. S., 504;
State of Ohio, ex rel. Jonak v. *White, et al.*, Members of the Industrial Commission of Ohio, 136 Ohio State, 213, 310 U. S., 609, 659.

(A) The right of appeal under the Ohio Workmen's Compensation Law is a statutory right and by legislative action such right may be given or denied.

Industrial Commission v. *Monroe*, 111 Ohio State 812, 813.

III

Procedure for enforcement of rights and remedy of wrongs is peculiarly a subject for state regulation and control. The exercise of this regulation and control is pre-

sumed to be constitutional. The statutory provision will be upheld unless it is clearly unreasonable and arbitrary.

State of Ohio, ex rel. Lourin, v. *Industrial Commission*, 138 Ohio State 618;

Jeffry Mfg. Co. v. *Blagg*, 235 U. S. 571;

Middleton v. *Texas Power & Light Co.*, 249 U. S., 152;

Insurance Co. v. *Glidden*, 284 U. S. 151;

State of Ohio, ex rel. Jonak v. *Whitey, et al.*, Members of the Industrial Commission of Ohio, 136 Ohio State 213, 310 U. S., 609.

Motion to Dismiss or Affirm

For the foregoing reasons, and based upon the foregoing authorities, this appellee moves that the Court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio entered on the nineteenth day of July, A. D. 1944, in favor of this appellee.

THOMAS J. HERBERT,
Attorney General of the State of Ohio,
Attorney for Defendant-Appellee.

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In the Supreme Court of the United States

No. 684.

OCTOBER TERM, 1944.

COPPERWELD STEEL COMPANY,

Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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In the Supreme Court of the United States

No. 684.

OCTOBER TERM, 1944.

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

I.

A Federal question is properly before this Court where it was raised and passed upon in the highest State Court and was necessary to the determination of the cause in that Court.

The petition in the Supreme Court of Ohio prayed in substance (See opinion, 142 O. S. 439, 441) that the orders of the Industrial Commission be set aside; that the claims be disallowed; that a writ issue, prohibiting and enjoining the defendant from continuing the orders in effect, from making any payments thereunder, and from taking into consideration any payments which may have been made thereunder in the rating of the plaintiff's Workmen's Compensation risk, and requiring the defendant to vacate such orders and disallow the claims; and for other relief; alleging that otherwise the orders of the Commission would deprive the plaintiff of its property without due process of law and would deny it the equal protection of the laws. From this, it necessarily follows that the judgment of the court denying any remedy to appellant deprives it of property without

due process and denies it the equal protection of the laws; and it was so alleged in the amendment to the petition. The judgment of the State court was based on its construction and application of the Workmen's Compensation Act, which was accordingly drawn in question and held not repugnant to the Fourteenth Amendment.

Appellee could not have intended literally the statement that the question of constitutionality was not properly raised in the Supreme Court of Ohio; but only that the unconstitutionality of the Workmen's Compensation Act was not expressly alleged before the Act was so construed and applied as to deny due process and equal protection of the law.

Any one of the grounds claimed—the unconstitutionality of the orders of the Commission, of the judgment of the State court, or of the Workmen's Compensation Act—gives this Court jurisdiction to hear this cause upon certiorari; and this Court will consider the petition for appeal as a petition for certiorari, under 28 U. S. C. § 344(c), if it should be considered that the appeal itself was improvidently taken.

But we submit that the appeal was properly taken and allowed on the last of these grounds—the unconstitutionality of the Workmen's Compensation Act. Under 28 U. S. C. § 344(a) it is not required that the validity of the statute be drawn in question expressly, in any particular pleading or manner, or by the appellant. Indeed, if the adjudication of a Federal question is necessarily involved in the disposition of the case by a state court, it is not necessary that it appear in the record or in the opinion that such a question was raised and decided. *Cissna v. Tennessee*, 246 U. S. 289, 293; *Kaukauna Company v. Green Bay and M. Canal Company*, 142 U. S. 254, 269.

Where the validity of a state statute is drawn in question, and the decision is in favor of its validity, this Court has repeatedly held that if the Federal question appears

in the record and was decided, or that such a decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here—*Water Power Company v. Street Railway Company*, 172 U. S. 475, 488, and cases cited therein.

Where the highest state court considered a question as fairly before it for determination, and decided it, the question has been properly raised—*St. L. I. M. & S. Ry. v. Hesterly*, 228 U. S. 702, 704; *Miedreich v. Lauenstein*, 232 U. S. 236, 243; *Mallinckrodt Works v. St. Louis*, 238 U. S. 41, 49; *Whitfield v. State*, 297 U. S. 431, 436.

It is sufficient that the question was considered in the opinion and ruled against appellant—*Land & Water Company v. San José Ranch Co.*, 189 U. S. 177, 179; *Philadelphia Fire Association v. New York*, 119 U. S. 110, 115; *Haire v. Rice*, 204 U. S. 291, 299.

It is sufficient to the jurisdiction of this Court that the Supreme Court of Ohio could not have denied appellant a hearing upon questions of law and review of, prohibition against, or mandamus to compel a reversal of, the orders of the Commission without holding valid and not repugnant to the Fourteenth Amendment the Workmen's Compensation Act as construed and applied by it, whereby—

(a) orders of the Commission awarding compensation payable from the state insurance fund are accorded finality (G. C. § 1465-90); and

(b) a self-insuring employer or an employer violating the act by failure of compliance may defend against collection of an adverse award of compensation upon any legal ground (G. C. § 1465-74). On the other hand, the court held that the contributing employer is neither a necessary nor proper party to proceedings for allowance of a claim under G. C. § 1465-90; that it has no direct financial interest in the distribution of the fund (Opinions, 142 O. S. 439, 444; 143 O. S. 591, 595);

and, therefore, that the contributing employer has no remedy against orders illegally awarding compensation for injuries and deaths not arising in the course or out of the employment, or which are invalid on any other legal ground.

The court specifically held that appellant was not denied due process of law or equal protection of the law by its decision, although under the statute the Industrial Commission includes as factors in the classification of risks and fixing of premium rates, the amount of all awards of compensation to employes within the industry and to employes of the particular employer, during the current five-year period; and by reason of the denial of a hearing upon questions of law and remedy against the unlawful awards, appellant, as a contributing employer, has been and will be deprived of property without due process of law, over the five-year period, amounting to over $20,000 in the year 1943 alone.

The unconstitutionality of the orders and judgment, and of the Workmen's Compensation Act, under which the majority of the court attempted to justify them, is demonstrated in the dissenting opinion (143 O. S. 596).

(A) The citations of appellee in I (A) of its Statement are not in point.

(B) *State ex rel. Williams v. Industrial Commission*, 116 O. S. 45, involved only an insignificant discrimination against employers contributing to the state insurance fund by an order for the payment from the surplus fund of compensation awarded to an employee of an insolvent, non-complying employer, and no contributing employer was there complaining (p. 55). Nevertheless, a majority of the court dissented (p. 48) on the ground that the provision involved (G. C. § 1465-75 as then in force) was unconstitutional.

Admittedly, in the case at bar, we do not question the validity of G. C. § 1465-54, sub 3, authorizing the Industrial

Commission to adopt and apply a form of merit rating system, nor do we question the actuarial formulae adopted by the Commission for rating industrial risks, or its classifications of risks, as was the case in *State ex rel. Powhatan Mining Company v. Industrial Commission,* 125 O. S. 272, where the court held the classification of risks and adoption of formulae for determination of premiums not unconstitutional "merely because it was not made with mathematical nicety or because in practice it results in some inequality." We concede the reasonable basis for the actuarial formulae adopted and applied and for the Commission's classifications of risks, but it was never intended that computations under such formulae should include any awards beyond the jurisdiction of the Commission such as awards for injuries and deaths which did not arise in the course of or out of the employment. Neither G. C. § 1465-54 nor the formulae or classifications adopted by the Commission thereunder are unconstitutional except as a part of the entire statute so construed as to deny any remedy or means of exclusion of unlawful awards, and particularly when compared with the right of self-insuring and non-complying employers to avoid awards which are unlawful for any reason.

II.

The case at bar does not relate merely to procedure and remedy (except as the denial of any remedy whatever is unconstitutional) and thereby differs from the cases cited by appellee, in none of which was there any substantial denial of remedy.

(A) *Industrial Commission v. Monroe,* 111 O. S. 812, 813, involved a section of the Act extending workmen's compensation to cases of occupational disease, but providing that G. C. § 1465-90 shall not apply thereto. However, if, upon the undisputed facts, the claimant had contracted

and suffered disability from an occupational disease, under all the conditions required by the statute, and the Commission should arbitrarily deny the claim, we submit that the Commission could be required by mandamus to allow and pay the claim. Likewise, if under the undisputed facts the employe clearly had no occupational disease within the definition of the Act, or, having such a disease, had contracted it elsewhere than in his employment, or during a period prior to that specified in the Act as essential to compensation, and if the Commission should nevertheless exceed its jurisdiction and award compensation, we submit that the courts would have jurisdiction to prohibit payment of such a claim.

III.

The cases cited under this subdivision do not concern matters of procedure. *State of Ohio ex rel. Lourin v. Industrial Commission,* 138 O. S. 618, involved a section of the Compensation Act in effect at the time the claim arose, providing a schedule of compensation for silicosis different from that for injuries and other occupational diseases.

Jeffrey Mfg. Co. v. Blagg, 235 U. S., 571, concerned the validity of a provision of the then optional Workmen's Compensation Act of Ohio abolishing the common law defenses of those employers of five or more workmen failing to comply with the Act.

Middleton v. Texas Power & Light Co., 249 U. S. 152, concerned the constitutionality of a provision excepting certain classes of employers and employes from application of the Workmen's Compensation Act of Texas.

We submit that the constitutionality of the orders of the Commission, the judgment of the court below, and the Workmen's Compensation Act, as construed and applied by that court, were called in question and necessarily decided adversely to the claims of appellant, and that full

opportunity should be allowed for presentation of this cause to this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 684.

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLANT.

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(2) The Court erred in holding that § 871-38 of the General Code of Ohio, providing that any employer or other person in interest being dissatisfied with any order of the Industrial Commission may commence an action in the Supreme Court against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to orders allowing claims for workmen's compensation under § 1465-90 of the General Code 20

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(4) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not deprived of property without due process of law by the court's construction and application of G. C. §§ 1465-90 and 871-38, and by its holding that appellant is not entitled to judicial hearing on, review of, prohibition, mandamus or other relief against such orders; although under the rules and system adopted by the Commission for the classification of occupations and industries and the determination of risks and rates, the premiums charged and required to be paid by appellant for workmen's compensation over a period of five years will be thereby greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943..... 30

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In the Supreme Court of the United States

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No. 684.

COPPERWELD STEEL COMPANY,
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vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLANT.

OPINIONS OF THE COURT BELOW.

The interlocutory opinion in the court below, the Supreme Court of Ohio, upon motion treated as a general demurrer to the petition, is officially reported in 142 O. S. 439 and is reprinted in the Record. (R. 12.) The prevailing and dissenting opinions on final judgment, on general demurrer to the petition and amendment to petition, are officially reported in 143 O. S. 591 and 596 respectively, and are reprinted in the Record. (R. pp. 23, 28.)

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked primarily upon appeal, under U. S. C., Title 28, §§ 344(a) and 861a, upon the ground that the Workmen's Compensation Act of Ohio was, by the Supreme Court of Ohio, necessarily held valid and not repugnant to the Constitution of the United States, although so construed and applied that appellant was thereby deprived of property without due process of law and was denied the equal protection of the laws.

By its decision, the Supreme Court of Ohio so construed and applied the Workmen's Compensation Act that

(a) Orders of the Industrial Commission awarding workmen's compensation for injuries and deaths of employes of appellant are final even though such injuries and the injuries resulting in such deaths did not occur in the course of and did not arise out of the employment, the claims were not compensable, and the Commission had no jurisdiction to allow them;

(b) Appellant, an employer contributing to the state insurance fund under the Workmen's Compensation Act, is not afforded a judicial hearing upon, review of, or other attack against such claims or orders, even though they are beyond the jurisdiction of the Industrial Commission, are not supported by any evidence but are contrary to the uncontroverted evidence before the Commission, and are otherwise unlawful;

(c) By the rules and formulae duly established by the Industrial Commission for the classification and rating of occupations or industries with respect to hazards, and for the determination of risks and fixing of rates of premium and merit rating, the amounts of all awards of compensation are included as a factor in the computation of the rates and amounts of premiums required to be paid by contributing employers during the ensuing period of five years; and by reason of the holding that the appellant is not entitled to a judicial hearing upon, review of, or other relief against the illegal awards beyond the jurisdiction of the commission, appellant will be required to pay increased premiums for workmen's compensation over a period of five years to an extent not presently ascertainable but aggregating over $20,000.00 additional in the year 1943;

(d) The Act affords a hearing and review by appeal to employes upon orders denying claims for compensation; and it affords to employers qualified as self-insurers under the Act and to employers who, in violation of the Act, neither qualify as self-insurers nor contribute to the state insurance fund, a judicial hearing upon and review of the lawfulness of such orders upon the ground that they are beyond the jurisdiction of the Industrial Commission, or any other

legal ground, by simply refusing to pay the unlawful award and setting up the illegality of the order in a suit for collection of the award; this is not available to contributing employers since awards to their employes are paid from the state insurance fund and although they are adversely affected in equal degree (in the case of appellant the increased premiums assessed against it will probably exceed the amounts awarded) they have no remedy and are thereby denied the equal protection of the laws.

The Dissenting Opinion below recognized the constitutional questions saying (R. 30):

> "In my view of this case two constitutional questions must be considered. (1) Is the complying employer being deprived of his property without due process of law? (2) Is the complying employer being granted the equal protection of the law?"

In addition to the right of appeal, jurisdiction of this Court is invoked under the provisions for certiorari, U. S. C. Title 28, § 344(b), (c), upon the ground that by the Workmen's Compensation Act of Ohio, the orders of the Industrial Commission and the decision and judgment of the Supreme Court, the State of Ohio has deprived appellant of property without due process of law and has denied it the equal protection of the laws.

For a more complete statement reference is made to the Statement in Support of Jurisdiction filed in the Supreme Court of Ohio, and separately printed here.

STATEMENT OF THE CASE.

The case originated by petition filed in the Supreme Court of Ohio wherein appellant sought review either under favor of Section 871-38 of the General Code of Ohio or by prohibition, mandamus, or otherwise, of six several orders of the Industrial Commission of Ohio awarding workmen's compensation for deaths of two and injuries sustained by four employes of appellant, upon the ground

that such orders were unreasonable, unlawful, beyond the jurisdiction of appellee, and constituted a gross abuse of discretion upon its part. The case was first submitted upon a motion to the petition (R. 8), which was treated as a general demurrer and sustained. (R. 45.) Thereafter, appellant filed an amendment to the petition (R. 20), and on demurrer to the petition and amendment (R. 23), final judgment (R. 46) was rendered for appellee. The facts are alleged in the petition (R. 1) and amendment to petition. (R. 20.)

The collision, out of which the injuries and deaths resulting in the claims involved herein arose, did not occur during the time or in the place or zone of employment of the injured or deceased men, or any of them, nor was such employment the direct or proximate cause thereof. (Amendment to Petition, R. 21.)

The collision occurred upon a grade crossing upon the property of The Baltimore & Ohio Railroad Company, and a road upon which the public were free to, and did freely, travel and over which appellant exercised no control whatsoever. The means of egress was freely chosen by the men involved; other means of egress were available and were used by others of appellant's employes.

The collision occurred on the morning of November 13, 1941 while the injured and deceased men were on their way home, after completing their day's work. They had left appellant's plant, entered the automobile and driven to the crossing, at least one thousand feet outside the gate of appellant's plant. The hazards at the crossing involved herein were much less than at other crossings commonly traversed by the public, including those which it was necessary for these employes to cross on their way to and from their homes and work, and also those which it was necessary for men living in the same general locality, and employed at other plants in and near the City of Warren, to cross in going to and from their homes and work. The view of the train, approaching

for more than one thousand feet from the crossing, was clear and unobstructed to the injured and deceased men over the entire distance traveled by them; they actually saw it and warned and requested the driver to stop, but he wilfully drove around another car, which had stopped to permit the train to pass, and into collision with the train. The collision, injuries, and deaths did not arise in the course or out of the employment of the injured and deceased men; the contrary findings of the Industrial Commission were not supported by any evidence, but were against the uncontroverted evidence before the Commission (Petition, R. 6); and the claims were not in law compensable.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

Appellant adopts its Assignment of Errors (R. 39) to the same extent as though fully repeated herein, and specifies all of such assigned errors as those intended to be urged herein. They are printed as captions to the several divisions of the Argument.

SUMMARY OF WORKMEN'S COMPENSATION ACT.

The Workmen's Compensation Act of Ohio is authorized by Article II, Section 35 of the Ohio Constitution.

The Act as originally adopted in 1912 was optional but is now compulsory on substantially all employers having three or more persons in their employ. It was originally administered by the State Liability Board of Awards, superseded by the Industrial Commission under the Industrial Commission Act, so-called, passed in 1913.

The Industrial Commission classifies occupations and industries with respect to their degree of hazard, determines the risks of the different classes and fixes rates of premiums for the several risks, based upon total payroll in each of the classes of occupation or industry, or other basis consistent with insurance principles, to maintain a state insurance fund and surplus for the benefit of employes in-

jured and dependents of employes killed in the course of employment. It also is authorized to adopt a system for the merit rating of employers upon the basis of their individual industrial accident experience and has done so. Rates are revised annually in accordance with the latest five calendar years' experience.

Every employer subject to the Act is required either to pay semi-annual premiums based upon payroll into the state insurance fund or to qualify as a self-insuring employer, in which case it is required to pay into the state insurance fund only such amounts as are required to be credited to surplus.

Employes injured and dependents of those killed in the course of employment are entitled to workmen's compensation including medical, hospital, funeral and similar expenses, payable from the state insurance fund in the case of contributing employers and directly by self-insuring employers.

Employers complying with the Act are not liable at common law or by statute for injuries or deaths of their employees. Employers who fail to comply with the Act are not entitled to the benefits of the Act, are liable to suit at common law for injuries or death sustained in the course of employment and may not avail themselves of the common law defenses of the fellow-servant rule, assumption of risk or contributory negligence, and together with their officers are liable to penalty by way of fine and imprisonment therefor. Nevertheless employees of non-complying employers may elect to file claim for workmen's compensation and if compensation is awarded thereon the employer is required to pay it or furnish bond and if unpaid the claim is certified to the Attorney General for suit against the employer. The same Section provides for similar suit against a self-insuring employer who for any reason fails to pay compensation awarded to its employe by order of the Commission.

If the Commission finds that any employer subject to the Act has failed to comply therewith proceedings are provided for the assessment of premiums for the time during which the employer has been subject to the Act and if the premiums assessed are not paid within ten days after notice the Commission certifies its determination to the Attorney General who is required to file a civil act for collection of the premium. Unless the employer within ten days execute bond to the State in double the amount so found the court is required to appoint a receiver for the property and business of the employer. A similar procedure is provided for the case of an employer who has complied with the Act and thereafter defaulted in any payment required to be made to the state insurance fund for a period of ten days.

The Industrial Commission is granted full power and authority to hear and determine all questions within its jurisdiction and its decisions thereon are declared to be final except that upon denial of claim for compensation upon the ground that the injury did not arise in the course or out of the employment or other specified grounds the Claimant may demand a rehearing which is then required; if his claim be denied upon rehearing he may appeal to the Common Pleas Court of the county in which the injury occurred or, if it occurred outside the state, the county in which the contract of employment was entered into. The defendant is the Industrial Commission in the case of a contributing employer or the employer itself in the case of a self-insuring employer.

SUMMARY OF ARGUMENT.

The court below erroneously held that when a claim for workmen's compensation is allowed the action of the Industrial Commission is final and that employers cannot appeal from the order of allowance, thereby misconstruing the first sentence of G. C. § 1465-90 under which such final-

ity is accorded only to decisions upon questions "within its jurisdiction." The jurisdiction of the Commission to award compensation for injuries and deaths of employes extends only to those arising in the course of employment, which includes the qualification that they must also have arisen out of the employment, i.e., there must be a causal connection between the employment and the injury or death.

The question whether the injury or death involved in a claim for compensation arose in the course and out of the employment is jurisdictional. Administrative orders unsupported by evidence showing the facts required by the statute as a basis for the orders are beyond the power and jurisdiction of the Commission, as are the orders involved herein; indeed these orders were contrary to the uncontroverted evidence before the Commission. The inquiry whether an order is reasonable and in conformity to law and whether supported by any evidence is judicial in character and a judicial hearing or review before a court must be afforded at some stage of the proceedings.

The enabling provision of the Constitution upon which the Workmen's Compensation Act is based accords finality to decisions of the Commission only upon question whether an injury, disease, or death resulted because of the failure of the employer to comply with a specific safety requirement. The courts have always heretofore recognized that on matters of jurisdiction and other legal questions the orders of the Commission are subject to review in some form. Appellant herein being held by the court below to have been neither a necessary or a proper party to the claim proceedings before the Industrial Commission and being denied any remedy against the awards, has been denied any hearing, judicial or otherwise.

The Legislature of Ohio clearly intended to provide for review of orders of the Industrial Commission on questions of law or the reasonableness of the order but through an anomaly in the development of the decisions this right

has been construed away. Direct review by petition in the Supreme Court was provided not in the Workmen's Compensation Act but in the Industrial Commission Act adopted in the following year under which the Industrial Commission was constituted, and superseded the State Liability Board of Awards with all powers and authority formerly exercised by the latter under the Workmen's Compensation Act.

In the earlier cases there were other available specific remedies and in such cases the general provision for review of orders of the Commission was held applicable only to orders entered under the preceding sections of the Act, particularly the safety code, so called, overlooking entirely the provision of another preceding section whereby the Industrial Commission was invested with and exercises power under the Workmen's Compensation Act. In one case the court actually reviewed and set aside an order of the Commission awarding compensation, but justified it upon the fallacy that it was reviewing an order establishing the safety requirement upon which the award was based rather than the order awarding compensation. Actually it had no jurisdiction to review such order because of the passage of time within which petition for review thereof might be filed.

Specific provision is made in G. C. § 1465-90 for appeal by the Claimant, and relief is available to employers who either are qualified as self-insurers, or violate the Compensation Act by failure to comply, or those against whom awards of additional compensation for violation of a safety requirement are made—cases in which the compensation is not paid from the State Insurance Fund but is required to be paid by the employer, and in which the employer may refuse to pay and upon suit therefor defend upon any legal ground.

Since the Workmen's Compensation Act nowhere provides any method of review or remedy for the contributing

employer and since the review provided in the Industrial Commission Act has been held inapplicable to orders awarding compensation, Appellant had no remedy in the ordinary course of law and the only available relief is the extraordinary remedy of prohibition or mandamus. Prohibition is available to prevent an inferior tribunal possessing judicial or quasi-judicial powers from exceeding its lawful powers even when it rightfully entertains jurisdiction in the first instance. Prohibition has been granted to prevent allowance by the Commission of a claim barred by election to sue for damages at common law. The court below skirted this question by saying that prohibition will not issue to prevent the Industrial Commission from carrying out a lawful or valid award of compensation pursuant to G. C. § 1465-90. Likewise mandamus lies to compel the performance of a clear legal duty. It was the clear legal duty of the Commission to disallow these claims and having allowed them to vacate its orders.

Here then is a typical case to which the authors of the Constitution intended the due process clause to apply. The Ohio Courts clearly have heretofore recognized that a denial of judicial hearing on questions of law would deprive the employer of property without due process of law but in all such cases another form of remedy was available. Here the denial of any judicial hearing results in a substantial monetary damage. Although the contributing employer has no direct legal property interest in the State Insurance Fund it contributes semi-annual premiums thereto, in the computation of which all losses are included, thereby increasing the premiums payable during the period of five years succeeding any award. Likewise the losses are included in the computation of the merit rating of the individual employer. Consequently if the Appellant be denied any remedy against the unlawful orders involved it will be damaged to the extent of the increased premiums resulting from the increased rates and the adverse effect on

its merit rating due to the inclusion in the computation of awards for claims beyond the jurisdiction of the Commission. The total effect is not ascertainable in advance by reason of other factors, such as increasing payrolls, but for the year 1943 the increase in premiums resulting from the orders complained of aggregated $20,018.62.

No fault can be found with the rules and formulae adopted by the Commission for classification and rating of risks, determination of premiums and merit rating; therefore it would be futile to refrain from attack upon the unlawful orders but to wait and make collateral attack upon the orders fixing rates, determining merit ratings and assessing premiums. To default in the payment of premiums would subject the employer to hazards and penalties so severe that no responsible employer would consider it; that course of action would be illusory and the contributing employer would still be denied due process.

While the contributing employer has no legal interest in the State Insurance Fund it has a decided interest in the distribution of that fund since the amount of premiums which it contributes to the fund in the future are directly dependent upon the amount of awards payable to its employes from the fund. It is not necessary that there be a legal interest in the fund since the operative effect of such awards is to deprive it of property without due process of law and of the equal protection of the laws.

Self-insuring employers are required to pay awards of compensation direct to their employees injured in the course of employment; if an injured employee of a non-complying employer elects to claim compensation, an award therefor is payable by the employer direct. Consequently if the Commission exceeds its jurisdiction or the award be otherwise unlawful or unreasonable the employer may refuse to pay, compelling the Attorney General to sue therefor, and may defend upon any legal ground. On the other hand in the case of the contributing employer, as here in-

volved, the award is paid from the state insurance fund over which he has no control; consequently he does not have the remedy afforded the self-insuring employer and the employer violating the Act. He is accordingly denied the protection afforded by the law to employers of the other classes and to the employe who is given a specific right of rehearing and appeal upon denial of a claim upon any of a number of specified grounds.

By reason of the foregoing the court below erred in its final judgment sustaining the demurrer, denying a hearing upon the merits and entering judgment for Appellee. The dissenting opinion below (Rec. 28-34) clearly points out that the effect of that Court's orders is to deny to Appellant due process of law and the equal protection of the laws.

Irrespective of the necessary effect of the judgment below as holding the Workmen's Compensation Act valid and not repugnant to the Constitution of the United States, the decision and judgment of the court and the orders of the Commission deprived Appellant of its property without due process of law and denied the equal protection of the laws.

SPECIFICATION OF ERRORS URGED AND ARGUMENT.

(1) The Court erred in holding valid and not repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution the provision of the Workmen's Compensation Act (G. C. § 1465-90) that the decisions of the Industrial Commission upon claims for workmen's compensation on account of injuries and deaths of employes shall be final except that claimants may appeal from denial of such claims on grounds stated therein.

By its terms, the Workmen's Compensation Act provides that the Industrial Commission shall have full power and authority to hear and determine all questions within

its jurisdiction and that its decisions thereon shall be final, except that claimants are entitled to rehearing and appeal from denial of such claims on grounds stated therein. (G. C. § 1465-90, *post*, p. 58.)

The Supreme Court of Ohio, in its interlocutory opinion herein, (142 O. S. 439, 441—R. 14), held that when a claim is allowed, the action of the Commission is final and in that event the complying employer can not appeal from the order of allowance. The court thereby misconstrued the first sentence of G. C. § 1465-90 under which finality is accorded only to decisions on questions *within its jurisdiction.*

The jurisdiction of the Commission to award compensation for injuries and deaths extends only to claims where the injuries, or death, arise in the course of employment. Ohio Constitution, Article II, Section 35 (*post*, p. 45); G. C. § 1465-68 (*post*, p. 49); G. C. § 1465-72 (*post*, p. 53). The phrase "in the course of employment" has been construed as requiring also that the injury or death "arise out of" the employment in order to be compensable. 42 *O. Jur.* 627:

> "* * * It is also required that the injury, casualty, or disease have some causal connection with the employment, either through its activities, its conditions, or its environment, it being established that the provisions of the statute do not cover an injury which has its cause entirely outside of and disconnected with the business in which the injured workman is employed. * * *"

Fassig v. State ex rel., 95 O. S. 232, 246:

> "Much that has been already said applies with equal force to the remaining claims of plaintiff in error that the section in question denies to the employer in question the due process of law and the equal protection of the law, in violation of the provisions of the state and federal constitutions referred to.
>
> An additional objection is made against the validity of Section 27. It is said that the provision with

reference to an injury 'in the course of employment' permits an award to be made to one whose injury did not arise out of the employment. We do not think this contention is well taken. The language is found in the constitutional amendment as well as in the statute. It was plainly the intention of the framers of the amendment and of the statute to provide for compensation only to one whose injury was the result of or connected with the employment and would not cover any case which had its cause outside of and disconnected with the employment, although the employe may at the time have been actually engaged in doing the work of his employer in the usual way."

Highway Oil Company v. State ex rel., 130 O. S. 175, 178, 179:

> [p. 178] "This court has often interpreted the phrase 'in the course of employment' as used in the Constitution and statutes, and has consistently held that it refers only to an injury which is the result of or arises out of the employment. No injury having its cause outside of and disconnected with the employment is contemplated, even though the employe at the time may be engaged in the work of his employer in the usual way."
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> * * * * *
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> [p. 179] * * * "But it [the course of employment] excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood."

On page 180 the Court quoted with approval from *Vincennes Bridge Co. v. Industrial Commission*, 351 Ill. 444, 184 N. E. 603:

> "* * * there must be a proximately causative relation between the nature of his work and the injury * * *."

Accordingly we start with the general principle that injuries and death are not compensable: (a) unless they are occasioned in the course of employment, i.e., during the time and in the place where the workman is employed, and (b) unless they arise out of the employment, i.e., are caused by a hazard created or increased by the employment itself. The court below rode roughshod over this requirement, saying that it is inconsequential or immaterial whether the injuries and deaths were compensable or not (142 O. S. 441, 444; 143 O. S. 591, 595, R. pp. 14, 17, 27), thereby disregarding the essential elements of jurisdiction of the Commission under G. C. § 1465-90.

The question whether the injury or death arose in the course and out of the employment is jurisdictional. *State, ex rel. Butram v. Industrial Commission*, 124 O. S. 589, 593; *State, ex rel. Randolph v. Industrial Commission*, 128 O. S. 27, 30; *Humphries v. Steel Corporation*, 132 O. S. 263, 270.

Administrative orders unsupported by evidence showing the facts required by the statute as a basis for the order are beyond the power and jurisdiction of the Commission. *Hawkins v. Bleakley*, 243 U. S. 210, 215 (involving a Workmen's Compensation Act under which the Supreme Court of Iowa had held there was a right to judicial review except on questions of fact); *Waite v. Macy*, 246 U. S. 606; *Federal Radio Com. v. Nelson Bros. B. & M. Co.*, 289 U. S. 266, 277; *U. S. v. Abilene & S. Ry. Co.*, 265 U. S. 274; *Crowell v. Benson*, 285 U. S. 22, 48, 50.

It is alleged in the petition below (R. 6) that the collision which resulted in the injuries and deaths involved in these claims did not arise in the course of or out of the employment of any of the employes and had no causal (misspelled "casual" in printed record) relation thereto; and further that the finding in each of the orders of which review was sought, that the employe's injury was sustained in the course of his employment, is not supported by any

evidence but is contrary to the uncontroverted evidence before the Commission. In addition, specific facts were alleged in the petition and the amendment to the petition, showing that the injuries and deaths did not arise in the course of or out of the employment and these facts are of course admitted by demurrer. The dissenting judges in the court below (143 O. S. 596, 603, R. 34) said:

> "In the instant case all of the facts being admitted by the demurrer, upon those admitted facts, the commission was without jurisdiction or authority to grant any award of compensation to any of the six claimants and after having done so, it was without jurisdiction or authority to consider such awards in fixing the premium for the ensuing years thereby increasing such premiums."

An inquiry as to whether an order is reasonable and in conformity to law or whether it is supported by any evidence is judicial in character and judicial hearing before a court must be afforded. *Fed. Radio Com. v. Nelson Bros. B. & M. Co.*, 289 U. S. 266, 277; *Public Service Com. v. Havemeyer*, 296 U. S. 506. The legislature cannot confer on tribunals other than courts powers which are strictly and conclusively judicial. *Fassig v. State ex rel.*, 95 O. S. 232.

The Ohio Constitution accords finality only to awards for failure of compliance with a specific requirement. (Art. II, § 35, *post*, p. 45.)

> "* * * Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board and its decision shall be final * * *."

Even in such cases it is only the Commission's findings of facts which cannot be reviewed, and questions of law are reviewable.

Fassig v. State, ex rel., 95 O. S. 232, 242 (1917):

> "The action against the employer to recover the amount so ascertained and fixed must be brought in a court of general jurisdiction, and the defendant employer is entitled to a trial by jury. He is entitled to make the defense that he is not an employer of five or more employes, etc.; that the injury to the beneficiary was not received in the course of employment, or that it was wilfully self-inflicted; or he might show that he had paid his premium into the insurance fund. The defense that he would not be entitled to make in the case simply goes to the amount of compensation, for that is fixed pursuant to the statute."

Coal Company v. Industrial Commission, 108 O. S. 185 (1923), quoted *post*, p. 22; *Clemmer & Johnson Co. v. Industrial Commission*, 112 O. S. 421 (1925); *Slatmeyer v. Industrial Commission*, 115 O. S. 654:

> "2. Section 871-38, General Code, does not confer upon this court jurisdiction to review the decision of the commission in respect to the imposition of the added award. All questions relating to such additional award, save that upon which the decision of the commission is final, may be heard and determined in a single suit wherein the employer, when sued under § 1465-74, General Code, for the compensation fixed, may contest the basic legal questions necessary to be determined by the commission before making such additional award. (*Pittsburgh Coal Co. v. Industrial Commission*, 108 Ohio St. 185, 140 N. E. 684; *Gatton v. Industrial Commission*, 93 Ohio St., 203, 112 N. E. 503; *Fassig v. State, ex rel. Turner, Atty. General*, 95 Ohio St. 232, 116 N. E. 104; and *DeWitt v. State, ex rel. Crabbe, Atty. General*, 108 Ohio St. 513, 141 N. E. 551, followed.)"

The court sustained a demurrer to a petition for review under G. C. § 871-38, of an added award for failure of compliance with a lawful requirement saying, among other things, in the opinion (656-658):

"The paramount question to be determined by this court is: To what extent is the commission's decision final respecting specific requirements, and does that finality of decision extend to both questions of fact and questions of law?

The language of the [constitutional] amendment is the pole-star of this interpretation. Under it the commission has been given full power and authority 'to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement.' We are of the unanimous opinion that upon that question of fact the decision of the commission is final; but its finality extends only to the determination whether, in fact, the injury, etc., resulted because of the failure to comply with such specific requirement. The state having created, under its Constitution, a board of awards for the determination of that question of fact, there is no violation of the due process clause in failing to provide a judicial review upon that specific feature. The Constitution has committed that question to the exclusive jurisdiction of the Industrial Commission, sitting as a board of awards.

Does the finality of the commission's decisions extend to questions of law, arising in a proceeding where an additional award is imposed for failure to comply with such specific requirement? In this respect *this court holds that it does not*. The language of the Constitution is plain. The commitment of finality extends only to the single question of fact to be heard and determined. While the *constitutional amendment* may have contemplated that the industrial tribunal could dispose of a question of fact as well as a court constituted for that purpose, it no doubt *recognized that upon legal, fundamental, or jurisdictional questions, action by a court would be necessary. At all events, no legal questions were committed by the Constitution to the final jurisdiction of the commission.* If the original award as well as the added per centum were both attacked by the employer, *there is no doubt that the employer would have the right to prove that*

the employe was not an employe, and that he was not injured at all, or, if injured, that it was by self-infliction, that *the injury did not arise within the course of his employment*; and, if successful in either, the basis of the employe's claim having failed, naturally the added per centum could not be imposed. However, if there was no attack by the employer upon the original award, but the attack was confined solely to the imposition of the added per centum, the constitutional amendment does not deny the right of the employer to question the added award upon jurisdictional, legal, or constitutional grounds. If * * * in any manner the jurisdiction of the commission in respect to a specific requirement were attacked, that as well as other legal questions would still remain within the jurisdiction of the courts for the purpose of review, and a denial of judicial process in those respects would be a denial of due process." (Emphasis ours.)

Wallpaper Company v. The Industrial Commission, 132 O. S. 372, 376 (1937):

"This holding makes it unnecessary to pass upon the merits of the case, although they have been argued by counsel. Suffice it to say that, if the action of the commission has been so discriminatory or arbitrary as to amount to a gross abuse of discretion or has deprived the plaintiffs of property without due recourse of law, there are judicial remedies available to them, other than that sought by this action, where such injustices may be corrected."

State ex rel. Slaughter v. Industrial Commission, 132 O. S. 537, 542 (1937):

"Although the constitutional amendment apparently permits the General Assembly to accord finality to the decisions of the Industrial Commission on questions of fact appertaining to the right of claimants to compensation, it has never been recognized that the intent of such amendment is to deprive an aggrieved party of his 'day in court' on questions of law. Compare *Slatmeyer v. Industrial Commission*, 115 Ohio St., 654, 115 N. E. 484; *Pittsburgh Coal Company v.*

Industrial Commission, 108 Ohio St., 185, 140 N. E. 684; 42 *Ohio Jurisprudence*, 700 § 108."

In its interlocutory opinion herein (142 O. S. 439, 444, R. 17), and again in its final opinion (143 O. S. 591, 595, R. 26-27), the Supreme Court of Ohio said that the complying employer is neither a necessary nor proper party to a proceeding under G. C. § 1465-90 for the allowance of compensation. The order awarding compensation being held to be final, appellant, as a contributing employer, is denied any hearing, judicial or otherwise. It is thereby denied due process of law and the equal protection of the laws as more fully hereinafter shown.

(2) The Court erred in holding that § 871-38 of the General Code of Ohio, providing that any employer or other person in interest being dissatisfied with any order of the Industrial Commission may commence an action in the Supreme Court against the Commission to set aside, vacate or amend any such order on the ground that it is unreasonable or unlawful, does not apply to orders allowing claims for workmen's compensation under § 1465-90 of the General Code.

It is believed that awards of workmen's compensation under the laws of all other states than Ohio are final only on questions of fact, and are subject to review in some form of judicial hearing, and that the Legislature of Ohio likewise intended to provide for review on questions of law. By G. C. § 871-38 (*post*, p. 47), a part of the Industrial Commission Act so-called, passed in 1913, it is provided without qualification that any employer, being dissatisfied with any order of the Commission, may commence an action in the Supreme Court of Ohio against the Commission as defendant to set aside, vacate, or amend any such order. It is to be noted that the relief under this section is not limited but applies to "*any employer*" and to "*any order of the Commission.*" By an anomaly in the development

of the construction of this section by the Supreme Court of Ohio, it was held that the section does not permit review of orders of the Commission awarding compensation under the Workmen's Compensation Act in cases where another form of review or attack is available, but that review under it is limited to orders of the Commission under favor of the Industrial Commission Act itself. (G. C. §§ 871-1 to 871-45 inclusive.) The effect of such construction in the instant case, we submit, plainly denies to appellant equal protection of the laws and deprives appellant of its property without due process of law, contrary to the provisions of the Federal Constitution.

Gatton v. Industrial Commission, 93 O. S. 203, 207. This was a suit by an employe to require an award of compensation under G. C. § 871-38; demurrer was sustained to the petition on account of the existence of a remedy by appeal under G. C. § 1465-90. The court said at page 207:

> "The proceeding authorized by this section [871-38] is manifestly one which calls in question the reasonableness or lawfulness of an order of The Industrial Commission touching the matters referred to in the preceding sections."

From this the Court went on to say that the right of action granted by this section is limited to orders of the Commission relating to the safety requirements, sometimes referred to as the "Safety Code," comprised in the Industrial Commission Act. That assumption is not well grounded. The provisions for safety requirements begin with G. C. § 871-22 in which it is provided in part that the Industrial Commission may establish a code prescribing hours of labor, safety devices, safeguards, and other matters relating to the safety of employes. The court, however, disregarded the provision of § 12 of the Industrial Commission Act (103 O. L. 97, 656; G. C. § 871-12, *post*, p. 46), under which the Industrial Commission superseded, and exercises all powers and duties cast by law upon, the

State Liability Board of Awards originally provided in the Workmen's Compensation Act (102 O. L. 524), which until that time had the sole authority to make awards of compensation. The Industrial Commission was created and enabled to exercise jurisdiction in matters under the Workmen's Compensation Act only by the Industrial Commission Act; orders awarding compensation are made by it under favor of G. C. § 871-12, one of the sections of the Industrial Commission Act preceding G. C. § 871-38, and are, therefore, "matters referred to in the preceding sections," in the language of the *Gatton* case, *supra*.

In the next decision, *Coal Company v. Industrial Commission*, 108 O. S. 185, plaintiff, a self-insuring employer, was held to have a complete and adequate remedy against an illegal award by refusing to pay, and setting up the illegality as a defense in a suit on the relation of the Attorney General for the collection of, such award; as had been done by a non-complying employer, sued for recovery of an award of compensation and penalty in *Fassig v. State ex rel., supra*. We quote from *Coal Company v. Industrial Commission, supra*:

> "2. Section 27 of the Workmen's Compensation Act (Section 1465-74, General Code), enacted in 103 Ohio Laws, 82, provides an adequate remedy by due course of law, whereby an employer, when sued for the compensation fixed, may contest all jurisdictional facts necessary to be determined by the Commission before making an award for compensation."
>
> (p. 190) "Any defense that the employer may have touching the right of the claimant to participate may be made in an action brought in the name of the state for the benefit of the person entitled to the compensation. This view was expressed in the case of *Fassig v. State*, 95 Ohio St., 232, at page 242, 116 N. E., 104, at page 107, wherein the opinion states that, in an action so brought against the employer to recover the amount so ascertained and fixed, the defendant employer is

entitled to a trial by jury, and is 'entitled to make the defense that he is not an employer of five or more employes, etc.; that the injury to the beneficiary was not received in the course of employment, or that it was willfully self-inflicted; or he might show that he had paid his premium into the insurance fund. The defense that he would not be entitled to make in the case simply goes to the amount of compensation, for that is fixed pursuant to the statute.' In this connection it might be stated also that the employer could make the defense that the death did not, in fact, result from the injuries alleged to have been sustained."

Probably actually contrary is the decision in *Clemmer & Johnson Co. v. Industrial Commission*, 112 O. S. 421 (1925) in which a petition of an employer for review under G. C. § 871-38 of an order of the Commission granting an additional award for breach of a lawful requirement was held not demurrable, upon the stated ground that the additional award depended upon a safety requirement established by order which had not been in effect for the required thirty days prior to the accident, the court reasoning that the review was of the legality of the order for the lawful requirement, rather than of the award based thereon. We quote from the opinion (p. 426):

"Under the facts in *Gatton v. Industrial Commission*, 93 Ohio St., 203, 112 N. E. 503, and *Pittsburgh Coal Co. v. Industrial Commission*, 108 Ohio St., 185, 140 N. E. 684, this Court reached the conclusion that its jurisdiction was not sufficient, under § 871-38, General Code, to permit those actions to be maintained, the plaintiffs having other remedies, but in this case what is here complained of is the unlawfulness of the order of the Commission with respect to the specific requirements as applied to the plaintiff, and this order of the Commission was adopted by virtue of the authority vested in it under §§ 871-22, 871-25, 871-26 and 871-34, General Code, all of which precede § 871-38." (Emphasis ours.)

(pp. 427-428):

"The plaintiff here is not seeking a review of the award of compensation under the Workmen's Compensation Act, as provided by § 1465-37 *et seq.* To review such questions other remedies are provided, as is held in *Pittsburgh Coal Co. v. Industrial Commission, supra,* but the sole and only question involved in this action relates to whether or not the order of the Commission in respect to the specific requirement was unlawful for the reason that the same did not become effective until after the period of 30 days from its publication, as provided in § 871-26; the contention being a claimed violation of the Industrial Commission Act and not of the Workmen's Compensation Act."

* * * * *

"Entertaining the view that this Court has jurisdiction to hear and determine the lawfulness of the order of the Commission, made and attempted to be enforced under the provisions of the Industrial Commission Act, and that the order in question was not lawful, it follows that the demurrer to the petition must be overruled."

This reasoning is indeed strained. Under the law in effect at the time of that decision, proceedings to reverse, vacate or modify a judgment of final order could not be commenced unless within seventy days after the entry of the judgment or order complained of. (former G. C. § 12270.) This was not a mere limitation, but a matter of jurisdiction—*McGuire v. Ranney*, 49 O. S. 372; *Young v. Shallenberger*, 53 O. S. 291. From the files in the *Clemmer & Johnson* case it appears that the order establishing the safety requirement, the invalidity of which was the stated basis of the decision, had been entered by the Industrial Commission December 26, 1923. The date of the injury involved was January 11, 1924; the award of compensation was made June 17, 1924; an application for rehearing was filed July 16 and denied November 18, 1924; and the petition was not filed in the Supreme Court until December

18, 1924, almost a year after the time of the entry of the invalid order establishing a safety requirement. It is therefore submitted that Chief Justice Marshall, dissenting in *Slatmeyer v. Industrial Commission*, 115 O. S. 654, 675, was correct in saying that this decision declared the right of direct review by the Supreme Court of an award of compensation.

In *Slatmeyer v. Industrial Commission, supra*, the employer attempted to procure review of an additional award for breach of a lawful requirement; but the court held that all legal questions could be set up and determined by way of defense in a suit under G. C. § 1465-74. (See *ante*, pp. 17-19.)

While the holding of the Supreme Court of Ohio, that G. C. § 871-38 is inapplicable to permit review of orders of the Industrial Commission awarding compensation, is not unconstitutional where other methods of review or attack upon the legality of the awards are available, the limitation of review of "any order" to orders of the Commission under preceding sections of the Act can not logically exclude orders by virtue of Section 12 of the Act which gave the Commission jurisdiction formerly exercised by the State Liability Board of Awards under the Workmen's Compensation Act.

(3) The Court erred in holding that when an order of the Industrial Commission awarding workmen's compensation is challenged on the ground that the injuries or death for which claims are allowed are not compensable, employers contributing to the state insurance fund, whose premiums will be increased thereby, are not entitled to relief by way of extraordinary remedy.

The Workmen's Compensation Act nowhere provides any method of review or other relief against an order of the Commission ordering payment from the state insurance fund of claims for compensation unsupported by evidence

of facts required by the statute as a basis for the proceedings, or where as in the claims here involved the evidence affirmatively shows that the injuries and deaths did not arise in the course or out of the employment. Since such orders are held to be final under G. C. § 1465-90 and not subject to review under G. C. § 871-38, although the orders were void, appellant had no remedy in the ordinary course of law. The only relief then available is an extraordinary remedy at law, i.e., prohibition from continuing the orders awarding compensation in effect, from making any payments of compensation thereunder, and from taking into consideration any payments which may have been made thereunder in the rating of appellant's workmen's compensation risk, or mandamus requiring the defendant to vacate such orders and disallow such claims.

Prohibition may be invoked against an inferior court or tribunal, ministerial or otherwise, that possesses incidental judicial or quasi-judicial powers to keep such court or tribunal within the limits of its own jurisdiction. *Nolan v. ClenDening*, 93 O. S. 264. The opinion in that case at 271 quotes from *High on Extraordinary Legal Remedies*, §§ 764a, 781, in part, as follows:

> "And the remedy may be invoked against any body of persons or officers assuming to exercise judicial or quasi-judicial powers, although not strictly or technically a court."
>
> "The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but it is extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, has exceeded its legitimate powers." (Section 781.)

State, ex rel. McCrehan v. Brown, 108 O. S. 454.

State, ex rel. Shorr v. Viner, 119 O. S. 303. In that case prohibition was allowed on the relation of the attorney and legal counsel for the Board of Rapid Transit Com-

missioners of a city against proposed action of the Civil Service Commission of that city to forfeit relator's position by reason of political activity, under a provision of the municipal charter applying to persons in the administrative service, it being held that the relator was not in the administrative service of the city.

State, ex rel. Pavlowicz v. Edy, 134 O. S. 389;
State, ex rel. Arey v. Sherrill, 142 O. S. 574.

We quote from the Dissenting Opinion in the case at bar (R. 33):

> "The functions of the commission in granting awards to claimants and in fixing premium ratings are quasi-judicial. We have held upon numerous occasions that a writ of prohibition is the appropriate remedy to keep administration tribunals within the limits of their jurisdiction."

The Industrial Commission is an administrative tribunal; the claims upon which its orders were based were in excess of its jurisdiction; and it should be prohibited from making them effective. In *State ex rel. Wolf Run Coal Co. v. Industrial Commission,* 110 O. S. 487, prohibition was allowed against consideration of a claim barred by election, under the law in effect at that time, to sue for damages at common law instead of claiming workmen's compensation.

Mandamus lies to compel the performance by a public board or officer of a clear legal duty; and the Commission, having entered void orders in excess of its jurisdiction, clearly should be required to vacate them.

Of the two remedies, prohibition and mandamus, it would seem that prohibition is by its nature more appropriate. Both are extraordinary legal remedies and require that there be no adequate remedy in the ordinary course of law—*State ex rel. v. Mills,* 103 O. S. 172; *State ex rel. v. Zangerle,* 126 O. S. 118; *State ex rel. v. Industrial Commis-*

sion, 127 O. S. 583. The court below has made plain that there is no remedy in the ordinary course of law.

In the interlocutory opinion (142 O. S. 439, syl. 2, 444, R. 12, 16), the court below begged the question, saying that prohibition will not lie to prevent the enforcement of a lawful or valid award made pursuant to G. C. § 1465-90 upon claims properly before it; and in its final opinion (143 O. S. 591, syl. 2, R. 23), that when such an order is challenged only on the ground that the claims are not compensable, the employer is not entitled to relief by way of extraordinary remedy. But where, as we have seen, the claims are not compensable for the reason that the injuries did not arise in the course or out of the employment, the claims were not within the authority of the Commission and the awards were not made pursuant to but in spite of G. C. § 1465-90, are not valid or lawful but are beyond the jurisdiction of the Commission (*supra,* pp. 12-17).

The court below, in its interlocutory opinion (142 O. S. 439, 444-445, R. 17), is concerned lest the recognition of the employer's constitutional rights operate to deny the statutory right of the claimant to rehearing under G. C. § 1465-90. If true, that would not be a valid argument in favor of denying appellant any relief, but merely an argument for the unconstitutionality of the Act as applied to employes as well as to contributing employers. However, it is submitted that such would not be the effect. In Ohio, at least, the extraordinary writ of mandamus will not lie until the board or officer has had full opportunity to perform his duty (*Wapakoneta v. Helpling,* 135 O. S. 98, 103), and writs of prohibition will not ordinarily be allowed until the question of jurisdiction has been made and overruled in the court or tribunal whose jurisdiction is challenged. (*Ex Parte Oldham,* 2 O. App. 457, 459; *State, ex rel. v. Geiger,* 38 O. App. 253, 256.) Accordingly the employe is granted a hearing, and only if jurisdiction is unlawfully sustained and the claim allowed by the Com-

mission would prohibition be required. A writ of prohibition might well be limited in its effect to the particular hearing and not prevent a rehearing. On the other hand, if the Commission holds that it has not jurisdiction, then there is no occasion for the employer to seek prohibition and the claimant will not be denied his right of rehearing under G. C. § 1465-90, or his right of appeal therefrom. Of course he cannot complain if he does not have a full trial on appeal from rehearing. Verdict is frequently directed for defendant at the close of plaintiff's case for failure to make out a case.

In the interlocutory opinion (142 O. S. 439, syl. 3, 444, R. 13, 16) the court below recognized that mandamus will lie to compel the performance of a duty specially enjoined by law where failure to perform results from abuse of discretion, violation of law, or otherwise, even though the employer is not a party to the claim proceedings, and went on (R. 17) to say that the petition does not set up any abuse of discretion on the part of the Commission or facts to show that the orders were void, or invalid by reason of any statutory provision. The court thereby ignored the allegations of the petition (R. 6-7), that the orders are contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority of the Commission, and are beyond the jurisdiction of the Commission. The words "if any" were used advisedly in the petition since it is doubtful that the Commission has any discretion under G. C. §§ 1465-90, 1465-68, and 1465-72, to allow claims for injuries and deaths which did not arise in the course or out of the employment.

It is therefore submitted that the court erred in holding that appellant, an employer contributing to the state insurance fund, is not entitled to relief by way of extraordinary remedy.

(4) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not deprived of property without due process of law by the court's construction and application of G. C. §§ 1465-90 and 871-38, and by its holding that appellant is not entitled to judicial hearing on, review of, prohibition, mandamus or other relief against such orders; although under the rules and system adopted by the Commission for the classification of occupations and industries and the determination of risks and rates, the premiums charged and required to be paid by appellant for workmen's compensation over a period of five years will be thereby greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943.

The case at bar is typical of the situation to which it is believed the framers of the Constitution primarily intended the due process clause of the 14th Amendment to apply—the denial of a judicial hearing or remedy. Administrative orders of a judicial or quasi-judicial nature are void if a judicial hearing is denied, if the hearing granted is manifestly unfair, if the finding is indisputably contrary to the evidence, if the facts found do not as a matter of law support the order made. *Interstate Commerce Com. v. L. & N. R. R. Co.*, 227 U. S. 88, 91; *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287; *The Chicago Junction Case*, 264 U. S. 258; 44 S. Ct. 317; *Northern Pac. Ry. Co. v. Dept. of Public Works*, 268 U. S. 39. Appeal (or writ of error) was allowed in these cases.

The plight of appellant in this regard, under the decision below, is well stated in the dissenting opinion, 143 O. S. 596, 599-600 (R. 30):

> "*Class No. 1 Complying Employers*—Where an employe of a complying employer is killed or injured claim is made to the commission and if an award is granted compensation is paid out of the State Insur-

ance Fund. The employer has no voice in the matter. There is no forum wherein such complying employer can set up the defense that the injury or death did not occur in or arise out of the employment even though that be the fact.

By the provisions of the statute every award granted by the commission results in an increase in the premium which the complying employer must pay for the ensuing years. The net result is that whether an award is rightfully or wrongfully made the complying employer cannot be heard to complain."

It is not necessary to go beyond the decisions of the Supreme Court of Ohio to demonstrate that such a denial of any review or remedy to resist an unlawful award is a denial of due process.

Fassig v. State ex rel., supra, pp. 13, 17.

Coal Company v. Industrial Commission, 108 O. S. 185, 189:

"Plaintiff further complains that the Ohio Workmen's Compensation Law deprives it of the guaranties of the equal protection and due process clauses of the federal and state Constitutions. Section 1, Article XIV, of the former, provides that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, while Section 16, Article I, of the Ohio Constitution, provides that all courts shall be open to every person for an injury done him, and he shall have remedy by due course of law.

It is argued that Section 1465-90, General Code, deprives the plaintiff of these guaranties. This section is part of the Workmen's Compensation Act, gives full power and authority to the Commission to determine all questions within its jurisdiction, and stipulates that its decisions shall be final, with the proviso that 'in case the final action of such Commission denies the right of the claimant to participate at all or to continue to participate in such fund on the ground that the injury was self-inflicted or on the ground that

the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right,' the employe claimant has a right to appeal to the common pleas court for a trial of those issues going to the basis of the claimant's right to compensation. Neither this nor any other section, however, gives the right of appeal to the *employer* should the decision of the Commission be adverse to it."

"In the Ohio act the Industrial Commission grants an award to the employe in stipulated statutory amounts, depending upon death or disability. The amount of such compensation ascertained by the Commission must be paid by the self-insured employer within 10 days after receiving notice. Were Section 1465-90, General Code, the sole one under consideration, the plaintiff employer might urge that it neither had the equal protection of the law nor a remedy in due course, since that section grants the employe an appeal to a judicial tribunal in case the Commission denies his right to participate, and provides no remedy for either appeal or review upon the part of his employer. However, in our view, Section 27 of the Workmen's Compensation Act (Section 1465-74, General Code), enacted in 103 Ohio Laws, 82, provides an ample and adequate remedy to the employer on all jurisdictional facts, which the Commission must first determine before making an award for compensation."

Slatmeyer v. Industrial Commission, 115 O. S. 654, 658:

"If the added per centum were imposed where no specific requirement was 'enacted by the General Assembly or in the form of an order adopted by such board,' manifestly the commission's finding of failure to comply would be illegal; or if in any manner the jurisdiction of the commission in respect to a specific requirement were attacked, that as well as other legal questions would still remain within the jurisdiction of the courts for the purpose of review,

and a denial of judicial process in those respects would be a denial of due process."

Wallpaper Company v. Industrial Commission, supra:

(p. 376) "This holding makes it unnecessary to pass upon the merits of the case, although they have been argued by counsel. Suffice it to say that, if the action of the commission has been so discriminatory or arbitrary as to amount to a gross abuse of discretion or has deprived the plaintiffs of property without due recourse of law, there are judicial remedies available to them, other than that sought by this action, where such injustices may be corrected."

State ex rel. Slaughter v. Industrial Commission, 132 O. S. 537, 542:

"Although the constitutional amendment apparently permits the General Assembly to accord finality to the decisions of the Industrial Commission on questions of fact appertaining to the right of claimants to compensation, it has never been recognized that the intent of such amendment is to deprive an aggrieved party of his 'day in court' on questions of law. Compare *Slatmeyer v. Industrial Commission*, 115 Ohio St., 654, 115 N. E. 484; *Pittsburgh Coal Co. v. Industrial Commission*, 108 Ohio St., 185, 140 N. E., 684; 42 *Ohio Jurisprudence*, 700, Section 108."

By virtue of the Workmen's Compensation Act (G. C. §§ 1465-53, 1465-54), the Industrial Commission classifies occupations and industries with respect to their degree of hazard, determines the risks of the different classes, and fixes rates of premium, and likewise has adopted and applies formulae for the rating of risks, predicated upon the basis of individual industrial accident experience. We have no quarrel with the classifications and rating systems and formulae adopted by the Industrial Commission when they take into consideration awards of compensation properly chargeable to the industry as a whole and to appellant as an individual employer, and do not include

awards of compensation for non-compensable claims which it was beyond the jurisdiction of the Commission to allow. Appellant is one of the smaller rolling mill operators in Ohio, and one of the few which has not qualified as a self-insurer. During the five-year period ended December 31, 1942, in which the plaintiff was in operation less than 3¼ years, its payroll aggregated ($10,082,517) about 90% of that of all contributing employers in the same classification ($11,214,000), and the workmen's compensation premiums paid by it ($60,939) were over 72% of those paid by all contributing employers in that classification ($83,900); consequently its experience in the matter of claims was dominant in the determination of basic rates for the industry, as well as its own merit rating. The basic rate of the industry was 80¢ per $100.00 of payroll, against which it had a merit rating credit of 26¢, or a net rate of 54¢ because of its favorable accident experience; but by reason of the claims in question, the basic rate was increased to $1.00 and appellant's merit rating credit was eliminated, resulting in an aggregate increase of $20,018.62 for the year 1943 over the premiums which would have been charged to and paid by it were it not for the claims involved herein; and the claims in question will continue adversely to affect the basic and merit ratings of appellant during the full five-year period, in amounts not ascertainable in advance by reason of other varying factors entering into the formulae (Amendment to Petition, R. 21-22). That it was thus deprived of property without due process needs no further demonstration. The effect of the judgment below is well stated in the dissenting opinion (143 O. S. 596, 601, R. 32):

> "It is a matter of such common knowledge that judicial notice should be taken of the fact that the commission considers thousands of claims each year and like all human agencies undoubtedly it makes mistakes. In some cases claims are allowed that should

be rejected and some persons are compensated who should not receive compensation. In cases where awards are erroneously granted by the commission it is neither just nor equitable that the complying employer should be required to pay extra premiums on account thereof. Requiring such payments results in penalizing the complying employer by placing him upon a different basis than the self-insurer or the non-complying employer.

In this case the court goes a step further and decides, in effect, that even though the employer is compelled to pay large sums of money in additional premiums for a period of years by reason of erroneous awards of compensation made by the commission, still the complying employer cannot maintain an action to prohibit the commission from assessing and collecting such additional premiums.

If the complying employer has no remedy the assessment and collection of premiums based upon awards granted by the commission to a claimant not entitled thereto amounts to the taking of such employer's property without due process of law."

The court below (142 O. S. 439, 442, R. 15) cited *U. S. Wallpaper Company v. Industrial Commission*, 132 O. S. 372, 7 N. E. 2d 798, holding that an employer has no right to have an order fixing a premium rate reviewed, and (143 O. S. 594, R. 26), *State, ex rel. Powhatan Mining Company v. Industrial Commission*, 125 O. S. 272, denying a writ of prohibition against the application of the merit rating provisions of G. C. § 1465-54, and said that the employer is not aggrieved until the Commission applies the merit rating system (R. 27). It would then be too late. We concede that the rules and formulae for classification and rating of risks are neither unreasonable nor arbitrary, and therefore that orders establishing premium rates are not subject to review nor prohibition; that would be a collateral attack upon the excess of jurisdiction and unlawfulness of the awards which were directly attacked by our petition below.

The court below in its final opinion (143 O. S. 591, 593, R. 25) cited *State, ex rel. Williams v. Industrial Commission,* 116 O. S. 45, in which a majority of the court dissenting (p. 48) voted against the constitutionality of G. C. § 1465-75 as then in force, on the ground that the statute, by providing for payment out of the surplus fund of compensation awarded to an employe of an insolvent non-complying employer, amounted to a denial of due process, although such payment resulted in only an insignificant discrimination against employers contributing to the state insurance fund, and although no contributing employer was there complaining (p. 55).

It is suggested in the majority opinion on final judgment (143 O. S. 591, 596, R. 28) that appellant could have refused to pay a premium assessed against it, and, upon suit to recover the premium, make its defense, if any it has. To do so, however, appellant would necessarily have become a non-complying employer in violation of law, thereby losing the protection of the Workmen's Compensation Act against suits at common law for injuries to its employes and the defenses of the fellow servant rule, assumption of risk, and contributory negligence (G. C. § 1465-73, *post*, p. 53), and subjecting itself to civil action, requirement of bond, and appointment of a receiver of its business (G. C. § 1465-75, *post*, p. 56), and itself or its officers personally to criminal liability for fine and imprisonment. (G. C. § 1465-69a.) To require that appellant default in payment of future premiums in order to test the validity of the awards included in computation thereof, foregoing the protection of the act against suits at common law and subjecting itself and its officers to the other penalties of G. C. §§ 1465-69a, 1465-73, 1465-75 would deny due process. *Cotting v. Kansas City Stockyards Co.,* 183 U. S. 79; *Ex parte Young,* 209 U. S. 123; *Wadley Southern Ry. Co. v. Georgia,* 235 U. S. 651, 661; *Santa Fe Pac. R. R. v. Lane,* 244 U. S. 492; *DeWitt v. State,* 108 O.

S. 513, 531, 533—(Opinion of five judges dissenting from the opinion of two judges prevailing under the constitutional rule in Ohio requiring the concurrence of all but one of the judges in such a case.) In the last cited case the court quoted among others from *Wadley Southern Ry. Co. v. Georgia, supra,* at page 531:

> "But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

We quote further (page 533):

> "Five members of this court, viz., Marshall, *C. J.*, Robinson, Jones, Matthias and Day, *JJ.*, therefore hold that the clause contained in Section 1465-74, General Code, imposing a 50 per cent. penalty in addition to the statutory award, tends to compel obedience to the administrative orders of the Commission and operates as a deterrent upon an employer who may desire, in good faith, to test the validity of such orders, and, to that extent, transcends legislative power and violates the equal protection and due process clauses of the state and federal constitutions."

See also the dissenting opinion below in the case at bar. (R. pp. 32-33) from which we quote in part (R. 33):

> "Without quoting in detail all the provisions of the statute, suffice it to say that after the commission has determined the amount owed to the fund and notified the employer thereof such amount so determined shall be paid within ten days and upon failure so to do the commission shall certify the finding to the Attorney General who shall 'forthwith institute a civil action against the employer.' Such employer is granted ten days to answer and to execute a bond in double the amount claimed, with sureties satisfactory to the commission, conditioned that he or it will pay any judg-

ment and costs rendered against him or it for such premiums and upon failure to give such bond it becomes the mandatory duty of the court to appoint a receiver to take charge of the employer's business.

"If the employer is relegated to that remedy his cause is lost as soon as suit is instituted for the reason that he could not claim that he did not owe at least a part of the assessed premium. * * *

"In addition thereto if the employer had failed to pay the premium the corporation, its president, secretary, general manager or managing agent, each would be personally subject to fine and imprisonment (Section 1465-69a, General Code) and the corporation if sued by some injured employee during the period of non-compliance would be barred of all common-law defenses. To require the complying employer to undergo those hazards in order to review the correctness of an award made by the commission, none of which is required of a self-insurer, does not afford the complying employer equal protection of the law, nor does it afford him a remedy in the ordinary course of the law."

(5) The Court erred in holding that appellant, an employer contributing to the state insurance fund, is not denied the equal protection of the laws by the denial of any judicial hearing on, review of, prohibition, mandamus or other relief against orders of the Industrial Commission awarding workmen's compensation for injuries and deaths which are not legally compensable; although employers against whom awards are made for the payment of workmen's compensation otherwise than from the state insurance fund (self-insuring employers and employers who in violation of law are non-complying) may attack the legality of such orders by setting up any defense other than a question of fact in suit for the collection of such awards under the Workmen's Compensation Act. (G. C. § 1465-74.)

The unconstitutionality of the Workmen's Compensation Law, so interpreted as to require appellant to pay workmen's compensation premiums greatly in excess of those which would be charged if it were permitted to show the lack of jurisdiction to make some of the awards entering into the computation of rates and premiums, is even more striking when we consider that employes are granted the right of appeal from orders denying compensation (G. C. § 1465-90; that employers strong enough, and large enough to make it safe and desirable, to qualify as self-insurers, have full opportunity to attack any award of compensation to any of their employes upon any legal ground; and especially in comparison with the employer who, in defiance of the Act, neither qualifies as a self-insurer nor contributes to the state insurance fund, but, nevertheless, is afforded the same opportunity as a self-insurer to attack any award of compensation to any of its employes upon any legal ground by defense to a suit under G. C. § 1465-74. *Fassig v. State, ex rel., supra*, p. 17; *Coal Company v. Industrial Commission, supra*, pp. 17, 22, 31; *DeWitt v. State, ex rel., supra*, pp. 36-37; *Clemmer & Johnson v. In-*

dustrial Commission, supra, p. 23; *Slatmeyer v. Industrial Commission, supra*, pp. 17, 25; *State, ex rel., Slaughter v. Industrial Commission, supra*, p. 19. See also the dissenting opinion in the court below. (143 O. S. 596, R. 28-34.)

This argument was applied to the converse situation in the opinion in *Coal Company v. Industrial Commission*, 108 O. S. 185, 188, in reference to G. C. § 871-38:

> "The principle is analogous here. Since the employe may not avail himself of that section, as a 'person in interest,' to test the legality of an award made him by the Commission, the employer has not the right to invoke the jurisdiction of this Court for the same purpose. In the *Gatton* case we sustained the demurrer to the original petition, for the reasons stated, and we now adhere to the decision then made."

The employe has a right of appeal under G. C. § 1465-90; self-insuring and non-complying employers have a remedy under G. C. § 1465-74; only the employer contributing to the state insurance fund is without remedy. The denial of equal protection of the laws is self-evident.

(6) The court erred in holding that the appellant has no direct financial interest in the distribution of the state insurance fund, although by the allowance of claims for injuries and deaths which are not compensable and the payment of such awards from the state insurance fund, premiums charged and required to be paid by appellant for workmen's compensation will be greatly increased, to an extent not presently ascertainable but amounting to $20,018.62 for the year 1943.

The Supreme Court of Ohio, in its interlocutory opinion (142 O. S. 439, 444, R. 16, 17), and again in the majority opinion on final judgment (143 O. S. 591, 595, R. 26-27), has said that appellant as a complying employer is neither a necessary nor proper party to the proceeding under G. C. § 1465-90 for the allowance of compensation; that its

direct financial interest is not in the distribution of the fund or in the fund itself but in the creation of it, i.e., in the amount of premiums it pays in the future.

Strictly speaking, the court is perhaps correct in saying that appellant was not a necessary or proper party to the proceedings before the Commission, but if so, the resulting denial of its constitutional rights is thereby emphasized. To be sure, it has no legal interest in the state insurance fund itself, but it certainly has an interest in the distribution of the fund under unlawful awards of compensation to its employes; for such awards, unless held void and beyond the jurisdiction of the Commission, will necessarily be taken into consideration in fixing the basic premiums for the industry and in its individual merit rating. The majority opinion (143 O. S. 591, 594, R. 26) has cited the case *State ex rel. Powhatan Mining Company v. Industrial Commission*, 125 O. S. 272, in which the merit rating system adopted by the Commission was upheld as not based upon an unreasonable or arbitrary classification. That decision demonstrates the fallacy of the reasoning of the majority opinion below (143 O. S. 591, 595, R. 27) that the contributing employer has no interest in the distribution of the state insurance fund or in the fund itself, but only in the creation of it, and that it is not aggrieved if at all, by the unlawful allowance of a claim for compensation, or until the Commission has applied its merit rating system, a system against which, of course, no arguments can be invoked. Obviously, when the Commission makes a void award beyond its jurisdiction, the order should be attacked directly and at once rather than collaterally when the Commission later computes the rates of premium to be charged the industry and the individual employer; and, as stated above, we have no complaint against the methods of classification and rating or of individual merit rating where only lawful awards of compensation enter into the computations.

We have quoted (*supra*, p. 30) under the caption dealing with due process the analysis of the dissenting opinion relating to the situation of complying employers. We quote here the comparison in the same opinion of employers who do not comply and self-insuring employers (R. 31):

> "*Class No. 2 Non-complying Employers*—Where an employee of a non-complying employer is killed or injured the employee or in case of death his dependents have a choice of remedies. A civil action may be maintained for such death or injury against such employer or application may be made to the commission, and it may make an award and certify the same to the Attorney General who shall institute a civil action against such employer to compel payment. However, in either event, the non-complying employer may defend any action brought against him upon the ground that the death or injury did not occur in the course of or arise out of the employment. If such defense be established the non-complying employer is not required to pay for the death or injury of such employee.
>
> "*Class No. 3 Self-Insurers*—When an employee of such self-insurer is killed or injured, application is filed with the commission by the injured employee or by his dependents in case death ensues and, if an award is granted, the employer, if an action be instituted to compel payment of the award, may defend upon the ground that the death or injury did not occur in or arise out of the employment.
>
> "It is self-evident that the non-complying and self-insuring employers before being compelled to pay any award or damages have the legal right to have determined the question as to whether the injury or death occurred in or arose out of the employment. The complying employer has no such right. This court has held frequently that a complying employer has no right to review an order of the commission awarding compensation."

It is not necessary to the denial of due process or equal protection of the laws that appellant have a legal interest in the state insurance fund or that it be a necessary or proper party to proceedings before the Industrial Commission, since the operative effect of the Act, the orders of the Commission, and the decision of the court below is to deprive appellant of property without due process. *Voeller v. Warehouse Company,* 136 O. S. 427.

(7) The Court erred in its final judgment of July 19, 1944, sustaining the general demurrer to the petition and amendment thereto and entering judgment for the appellee.

Since the Supreme Court of Ohio, in its judgment of July 19, 1942, necessarily construed and applied the Workmen's Compensation Act so as to deprive appellant of property without due process of law and deny it the protection afforded by the laws to employes and to employers not contributing to the state insurance fund, whether self-insurers or non-complying employers violating the law, this assignment of error follows as a necessary conclusion to those hereinbefore discussed.

(8) The State of Ohio, by the Workmen's Compensation Act, the decision and judgments of the Court, and the orders of the Commission involved herein, has deprived appellant of property without due process of law and has denied it the equal protection of the laws.

We have herein treated the errors of the Supreme Court of Ohio as a basis for strict appeal under U. S. C. Title 28, § 344(a), i.e., we have directed our discussion to the point that the court, by its decision applying the Workmen's Compensation Act of Ohio, necessarily held that act valid and not repugnant to the Constitution although it so construed the act as to deny appellant due process of law and the equal protection of the laws. Likewise the deci-

sion and judgment of the court and the orders of the Commission deprived appellant of property without due process of law and denied it the equal protection of the laws—errors available as a basis for certiorari, under U. S. C. Title 28, § 344(b) and (c), without regard for the question whether the Workmen's Compensation Act was held valid and not repugnant to the Constitution.

CONCLUSION.

In conclusion, it is submitted that the State of Ohio by the Workmen's Compensation Act as construed and applied in the court below, by the orders of the Industrial Commission, and by the judgment of the Supreme Court, has deprived appellant of property without due process of law and has denied it the protection afforded by the law to employees, to self-insuring employers, to non-complying employers in violation of the Act and to employers against whom additional awards are granted for breach of lawful requirements and, accordingly, that the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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APPENDIX.

EXTRACTS FROM OHIO CONSTITUTION AND STATUTES RELIED UPON.

Constitution.

Article II, § 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, in so far as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than

fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution. (As amended. Effective Jan. 1, 1924. 110 O. L., 631.)

General Code of Ohio.

(Where the extract from the section quoted includes an amendment which became effective pending proceedings before the Supreme Court of Ohio, or pending the claim proceedings before the Industrial Commission, the new matter is shown in italics and the matter stricken out is in brackets; none of these affect the questions involved herein.)

§ 871-12. *Industrial Commission shall supersede the state liability board of awards; powers and duties.* The Industrial Commission shall supersede and perform all of the duties of the state liability board of awards, provided in and by the act of the general assembly of the State of Ohio passed the thirty-first day of May, 1911 (102 O. L. 524) G. C. § 1465-37 to 1465-81 entitled, "An act to create a state insurance fund for the benefit of injured and the dependents of killed employes and to provide for the administration of such fund by a state liability board of awards," and all amendments to said act, and by the act of the general assembly passed February twenty-sixth, 1913, approved March 14, 1913, and filed in the office of the secretary of state March 17, 1913, entitled "An act to further define the powers, duties and jurisdiction of the state liability board of awards with reference to the collection, maintenance and disbursement of the state insurance fund for the benefit of injured, and the dependents of killed employes and requiring contribution thereto by employers, and to repeal sections 1465-42, 1465-43, 1465-45 1465-46, 1465-53, 1465-54, 1465-55, 1465-56, 1465-57, 1465-58,

1465-59, 1465-60, 1465-61, 1465-62, 1465-63, 1465-64, 1465-65, 1465-66, 1465-67, 1465-68, 1465-69, 1465-70, 1465-71, 1465-72, 1465-73, 1465-74, 1467-75, [1465-75], 1465-76, 1465-77, 1465-78, 1465-79, of the General Code" [G. C. §§ 1465-41a and 1465-42, 1465-43, 1465-45, 1465-46 and 1465-53 to 1465-106, which were 103 v. 72, §§ 1 to 59 inclusive] on and after the first day of September, 1913; and said commission on and after the first day of September, 1913, as successor of the said liability board of awards, shall be vested with and assume and exercise all powers and duties cast by law upon said liability board of awards, and on the first day of September, 1913, the term of office of the members constituting the said state liability board of awards of Ohio shall cease and terminate, together with all rights, privileges and emoluments connected therewith. (103 O. L. 97, 656 § 12.)

§ 871-38. *Dissatisfied employer may commence action to set aside, vacate or modify an order.* Any employer or other person in interest being dissatisfied with any order of the commission may commence an action in the Supreme Court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the Supreme Court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The commission shall be served with summons as in other civil cases * * *. (103 O. L. 95, 107 § 38.)

§ 1465-37. There is hereby created a state liability board of awards, to be composed of three members, not more than two of whom shall belong to the same political party, to be appointed by the governor, within thirty days after the passage of this act, * * * (102 O. L. 524, § 1.)

§ 1465-53. The industrial commission of Ohio shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide an adequate fund for the compensation provided for in this act, and to maintain a state insurance fund from year to year, provided, however, that where the payroll cannot

be obtained or, in the opinion of the commission, is not an adequate measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such other basis, consistent with insurance principles, as shall be equitable in view of the degree of hazard, and whenever in this sub-chapter reference is made to payroll or expenditure of wages with reference to fixing premiums such reference shall be construed to have been made also to such other basis for fixing the rates of premium as the commission may in the foregoing instances determine. [* * * * *.] (As amended 119 O. L. 565; 120 O. L. 449, 450, Eff. 6-15-43.)

§ 1465-54. It shall be the duty of the industrial commission of Ohio, in the exercise of the powers and discretion conferred upon it in the preceding section, ultimately to fix and maintain, for each class of occupation, or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims for injury and death that it may authorize to be paid from the state insurance fund for the benefit of injured and the dependents of killed employes; and, in order that said object may be accomplished, said commission shall observe the following requirements in classifying occupations or industries and fixing the rates of premium for the risks of the same:

1. It shall keep an accurate account of the money paid in premiums by each of the several classes of occupations or industries, and the losses on account of injuries and death of employes thereof, and it shall also keep an account of the money received from each individual employer and the amount of losses incurred against the state insurance fund on account of injuries and death of the employes of such employer.

2. Ten percent of the money that has heretofore been paid into the state insurance fund and ten percent of all that may hereafter be paid into such fund shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars ($100,000.00) after which time, whenever necessary in the judgment of the industrial commission to guarantee a sol-

vent state insurance fund, a sum not exceeding five per cent of all the money paid into the state insurance fund shall be credited to such surplus fund. On the first day of July, 1917, and annually thereafter a revision of rates shall be made in accordance with the latest five calendar year experience of said commission in the administration of the law as shown by the accounts kept as provided herein; and said commission shall adopt rules governing said rate revisions, the object of which shall be to make an equitable distribution of losses among the several classes of occupation or industry, which rules shall be general in their application.

3. The industrial commission of Ohio shall have the power to apply that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience, and to encourage and stimulate accident prevention; shall develop fixed and equitable rules controlling the same, which rules, however, shall conserve to each risk the basic principles of workmen's compensation insurance. (As amended 119 O. L. Effective September 4, 1941.)

§ 1465-60. The following shall constitute employers subject to the provisions of this act:

1. * * *

2. Every person, firm and private corporation, including any public service corporation, that has in service three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written * * *. (As amended 116 O. L. 56, Eff. 7-4-35.)

§ 1465-68. Every employee mentioned in section 1465-61, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on and after January 1st, 1914, shall be entitled to receive, either directly from his employer as provided in section 1465-69, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services

and medicines, and such amount of funeral expenses in case of death as provided by sections 1465-79 to 1465-87 inclusive.

* * * * *

The term "injury" as used in this section and in the workmen's compensation act shall include any injury received in the course of, and arising out of, the injured employee's employment. (As amended 119 O. L. 565, 567, § 1, Effective September 4, 1941.)

§ 1465-69. Except as hereinafter provided, every employer mentioned in subdivision 2 of section 1465-60, General Code, *and publicly owned utility* shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by said commission; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, * * *. [* * * * * *]

Provided, however, that as to all employers * * * who may first become subscribers to said fund in any other month than January or July, the foregoing provisions for the payments of such premiums in the month of January, 1914, and semi-annually thereafter shall not apply, but such semi-annual premiums shall be paid by such employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them. And provided further, that such employers *and publicly owned utilities* who will abide by the rules of the industrial commission of Ohio and as may be of sufficient financial ability to render certain the payment of compensation to injured employes or the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in sections 1465-78 to 1465-89, General Code, and who do not desire to insure the payment thereof or indemnify them-

selves against loss sustained by the direct payment thereof, may, upon a finding of such fact by the industrial commission of Ohio, elect to pay individually such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes; and the industrial commission of Ohio may require such security or bond from said employers *and publicly owned utilities* as it may deem proper, adequate and sufficient to compel, or secure to such injured employes, or to the dependents of such employes as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employes or to dependents of killed employes, whose employers contribute to said fund, *except* when an employe of *such* employer, who has suffered the loss of a hand, arm, foot, leg, or eye, prior to the injury for which compensation is to be paid, and thereafter suffers the loss of any other of said members as the result of any injury sustained in the course of and arising out of his employment, the compensation to be paid by such employer *and publicly owned utility* shall be limited to the disability suffered in the subsequent injury, additional compensation, if any, to be paid by the industrial commission of Ohio, out of the surplus created by section 1465-54 of the General Code. * * * and said commission shall make and publish rules and regulations governing the mode and manner of making application and the nature and extent of the proof required to justify such finding of fact by said commission as to permit such election by such employers *and publicly owned utilities*, which rules and regulations shall be general in their application, one of which rules shall provide that all employers *including publicly owned utilities*, electing directly to compensate their injured and the dependents of their killed employes as hereinbefore provided, shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus in paragraph No. 2 of section 1465-54, General Code. The industrial commission of Ohio may at any time change or modify its findings of fact herein provided for, or revoke the right of such employer *or publicly owned utility* to pay compen-

sation direct, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employes. (As amended 120 O. L. 194, 195. Eff. 8-14-43.)

§ 1465-69a. It shall be the duty of each member of a firm, and of the president, secretary, general manager or managing agent of each private corporation, including any public service corporation mentioned in section 1465-60 of the General Code *or publicly owned utility* to cause such firm or corporation to comply with the provisions of Section 1465-69 of the General Code, and every person mentioned in said Section 1465-60 and members of such firms and said officers of such corporations *or publicly owned utilities* referred to in this section who neglect or fail to comply with the provisions of said Section 1465-69 shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars and, where the failure is wilful, imprisoned not more than ninety days, and shall pay the costs of prosecution. Such fine when collected shall be paid to the industrial commission and placed in *the* state insurance fund. (As amended 120 O. L. 194, 196, Eff. 8-14-43.)

§ 1465-70. Employers who comply with the provisions of Section 1465-69 shall not be liable to respond in damages at common law or by statute, for any injury, disease or bodily condition, whether such injury, disease or bodily condition is compensable under this act or not, or for any death resulting from such injury, disease or bodily condition, of any employe, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his injured or the dependents of his killed employes as herein provided.

* * * * *

(As amended 118 O. L. 422, 426, Eff. 5-26-39.)

§ 1465-72. The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued. All employers electing directly to compensate their injured employes, in compliance with this act, shall pay to such injured employes, or to the dependents of employes who have been killed in the course of their employment, unless such injury or death of such employe has been purposely self-inflicted, the compensation, and shall furnish such medical, surgical, nurse and hospital care and attention or funeral expenses as would have been paid and furnished by virtue of this act under a similar state of facts, by the state liability board of awards out of the state insurance fund, in case said employer had paid the premium provided by this act, into said fund.

* * * * *

And such payment or payments to such injured employes, or to their dependents in case death has ensued, shall be in lieu of any and all rights of action whatsoever against the employer of such injured or killed employes. (103 O. L. 72, 82, § 25.)

§ 1465-73. Employers mentioned in subdivision two of Section thirteen hereof (1465-60), who shall fail to comply with the provisions of Section twenty-two hereof, (1465-69), shall not be entitled to the benefits of this act during the period of such non-compliance, but shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses:

The defense of the fellow-servant rule, the defense of the assumption of risk or the defense of contributory negligence.

Any such employers shall also be subject to the provisions of the two sections next succeeding. (103 O. L. 72, 82 § 26.)

§ 1465-74. Any employe whose employer has failed to comply with the provisions of section 1465-69, who has been injured or has suffered an occupational disease in the course of his employment, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceedings against his employer by civil action in the courts, as provided in section 1465-73, file his application with the commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled to receive if such employer had complied with the provisions of section 1465-69, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the industrial commission a bond, in such an amount and with such sureties as the commission may require, to pay such employe such award in the manner and amount fixed thereby. In the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, or to furnish such bond, within a period of ten days after notification of such award, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state, for the collection of such award. In such action it shall be sufficient for plaintiff to set forth a copy of the record of proceeding of the commission relative to such claims as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding and award of the commission a specified sum which plaintiff claims with interest. A certified copy of such record of proceedings in such claim shall be attached to the petition and shall constitute prima facie evi-

dence of the truth of the facts therein contained. The answer or demurrer to such petition shall be filed within ten days, the reply or demurrer to the answer within twenty days, and the demurrer to the reply within thirty days after the return day of the summons or service by publication. All motions and demurrers shall be submitted to the court within ten days after the same are filed. As soon as the issues are made up in any such case, it shall be placed at the head of the trial docket and shall be first in order for trial. The cause of action herein provided and the cause of action provided by section 1465-75 may be joined in one action against an employer, and the amount of any premium paid or recovered from such employer for the period not exceeding six months during which such injury or disease, or injury or disease resulting in death, occurred shall be credited against the amount of any judgment for compensation recovered pursuant to the provisions of this section. The amount recovered in such action from such employer shall be paid into the state insurance fund. And any employe whose employer has elected to pay compensation to his injured, or to the dependents of his killed employes in accordance with the provisions of section 1465-69, may, in the event of the failure of his employer so to pay such compensation or furnish such medical, surgical, nursing and hospital services and attention or funeral expenses, file his application with the commission for the purpose of having the amount of such compensation and such medical, surgical, nursing and hospital services and attention or funeral expenses determined; and thereupon like proceedings shall be had before the commission and with like effect as hereinbefore provided.

And the commission shall adopt and publish rules and regulations governing the procedure before the commission provided in this section and shall prescribe form of notices and the mode and manner of serving the same in all claims for compensation arising under this section. Any suit, action, proceeding or award brought or made against any employer under the provisions of this section, may be compromised by the commission, or such suit, action or proceeding may be prosecuted to final judgment as in the dis-

cretion of the commission may best subserve the interests of the state insurance fund.

A final judgment against the employer recovered in the manner provided herein shall entitle such claimant to the compensation provided by this act for such injury, occupational disease or death and such compensation shall be paid from the surplus created by section 1465-54, and any sum then or thereafter recovered on account of such judgment shall be paid to the commission and credited to such fund as the commission may designate. (As amended 114 O. L., 31. Effective July 8, 1931.)

§ 1465-75. If the industrial commission finds that any person, firm or private corporation, including any public service corporation is, or has been at any time after January 1, 1923, an employer subject to the provisions of paragraph 2 of section 1465-60, it shall determine the period during which he or it was such an employer, which finding and determination shall for all purposes of this act be prima facie evidence thereof. The commission shall forthwith give notice of said action to the employer who shall immediately thereafter furnish the commission with a pay roll covering the period included in said finding, together with an estimated pay roll for six months next succeeding the date of such finding, if such employer is subject to the provisions of paragraph 2 of section 1465-60 on the date of such determination, and shall forthwith either pay into the state insurance fund the amount of premium determined and fixed by the commission for such period or shall comply with the provisions of section 1465-69 with reference to the direct payment of the compensation and benefits provided by this act.

If said employer fails, neglects or refuses to furnish such pay roll and pay the premium for such period or to elect to pay directly such compensation and benefits accruing because of injuries, diseases or deaths occurring during such period, as provided by section 1465-69 within ten days after receiving such notice, the commission shall then determine the amount of premium due from said employer for the period the commission found him or it to be subject to this act, including the amount of premium to be paid by him or it for the next succeeding six months, if such em-

ployer is subject to the provisions of paragraph 2 of section 1465-60 on the date of such determination and shall notify said employer of the amount thereof and shall order the same paid into said fund. If said amount is not paid within ten days after receiving such notice, the commission shall certify the same to the attorney general, who shall forthwith institute a civil action against such employer in the name of the state for the collection of such premium. In such action it shall be sufficient for plaintiff to set forth a copy of the finding of the commission relative to such employer as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding of the commission a specified sum which plaintiff claims with interest. A certified copy of such finding relative to such employer shall be attached to the petition and shall constitute prima facie evidence of the truth of the facts therein contained. The answer or demurrer to such petition shall be filed within ten days, the reply or demurrer to the answer within twenty days, and the demurrer to the reply within thirty days after the return day of the summons or service by publication. All motions and demurrers shall be submitted to the court within ten days after the same are filed. As soon as the issues are made up in any such case, it shall be placed at the head of the trial docket and shall be first in order of trial.

Unless said employer shall, within the ten days last aforesaid, execute a bond to the state in double the amount so found and ordered paid by the commission, with sureties to the approval of the commission, conditioned that he or it will pay any judgment and costs rendered against him or it for said premium, the court at the time of the filing of the petition, and without notice, shall appoint a receiver for the property and business of such employer, in this state, with all the powers of receivers in other cases, who shall take charge of all said property and assets of the defendant and administer the same under the orders of the court.

If upon final hearing of said cause it is found and determined that the defendant is subject to the provision of paragraph 2 of section 1465-60, the court shall render judgment against said defendant for the amount of premium, provided to be paid by such employer for such period under

the provisions of this act, with interest from the date of the determination of said amount by the commission, together with costs, which judgment shall be given the same preference as is now or may hereafter be allowed by law on judgments rendered for claims for taxes.

If any employer who has complied with this act shall default in any payment required to be made by him or it to the state insurance fund, for a period of ten days after notice that such payment is due, the same proceedings may be had as in the case of an employer against whom the commission has made a finding as hereinbefore provided.

* * * (As amended 114 O. L., 33. Eff. 7-8-31.)

§ 1465-90. The commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon shall be final, except as provided in this section. The commission shall definitely and specifically pass upon each and every issue raised in the claim, necessary for a proper and complete decision thereon. In all claims for compensation on account of injury, or death resulting therefrom, if the commission denies the right of the claimant to receive compensation or to continue to receive compensation the order of the commission shall state the ground or grounds on which the claim was denied; and if the claim was denied on any of the following grounds: that the injury was self-inflicted; that the injured person was not an employee; that the injury did not occur in the course of or arise out of the employment; that the claimant's disability is not the result of the injury; that the claimant, having received compensation for the period of temporary total disability and having received the maximum amount of compensation for temporary partial disability as provided in this act, and having engaged in no gainful occupation for the period of four years prior to the decision of the commission, during which time compensation has been payable to such claimant, is not permanently and totally disabled as a result of the injury; that the death did not result from the injury; that the claimant was not legally or actually dependent upon the decedent; or that the employer was not amenable to law; then the claimant may within thirty days after the receipt of notice of such finding of the commission, file an application with the com-

mission for a rehearing of his claim, whereupon the former action of the commission thereon shall be vacated. If the order of the commission does not state the ground or grounds on which the claim was denied, or if the order of the industrial commission is not definite in such regards, the claimant may maintain an action in mandamus against the commission in the supreme court of Ohio, and, if the final order in such proceedings directs the commission to state the ground or grounds of its order or make the order definite as to the ground or grounds thereof, then there shall be taxed as part of the costs assessed against the commission an attorney fee in the amount of $250.00. The commission shall fix a date for rehearing of such claim and give the claimant and his employer at least one week's prior notice thereof; at said hearing, if the claimant is asking for compensation from the state fund, the attorney general, or any one or more of his assistants or special counsel who have been designated by him to act as attorney to the commission, may represent the state fund, and in the absence of the attorney general or his designated assistants or special counsel, the commission shall elect one or more of the attorneys in the employ of the industrial commission to represent the state fund. Such hearing shall be had and the evidence for and against the allowance of the claim submitted as in the trial of civil actions. The commission shall pass upon the admissibility of evidence, but either party may at the time make objection and take exception to the rulings of the commission thereon, and if the commission refuses to admit any evidence, the party offering the same shall state the nature of such evidence and the matter which such party proposes to prove thereby, and such statement shall be made a part of the record of such rehearing. Such rehearing may be continued from time to time.

If the commission, after such hearing, denies the right of the claimant to receive or to continue to receive compensation it shall state the ground or grounds on which the claim was denied and if the claim was denied on any of the grounds hereinabove specifically stated then the claimant, within sixty days after receipt of notice of such action of the commission, may file a petition in the common pleas court of the county wherein the injury was inflicted, or in the common pleas court of the county wherein the contract

of employment was made in cases where the injury occurs outside the state of Ohio. If the claimant is seeking compensation from the state insurance fund, the defendant in such action shall be the industrial commission and summons shall be issued to the industrial commission and also to the attorney general. If the claimant is seeking compensation from an employer who has qualified to pay compensation direct, as provided by section 1465-69 or from an employer who has failed to comply with this act, the defendant in such action shall be such employer and summons shall issue to such employer. Further pleadings shall be had in accordance with the rules of civil procedure. The attorney general shall designate one or more of his assistants or special counsel to act as counsel for the commission and he shall call upon the prosecuting attorney of the county in which the suit is pending to render such assistance in connection therewith as he, the attorney general, may deem necessary; and if, for any reason at any stage of such proceeding, the attorney general, his assistants or special counsel do not appear for or represent and defend the commission, the commission shall select one or more of the attorneys in the employ of the industrial commission to represent the commission.

Within ten days after the filing of the answer the industrial commission shall certify to such court a transcript of the record of such rehearing, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in such fund upon the evidence contained in such record and no other evidence; but the court may exclude from evidence such portions of the transcript which are not competent, material or relevant evidence and to which objection was made * * * at such rehearing before the commission and may admit in evidence such competent, material or relevant evidence as was excluded by the commission at such rehearing, over the objection * * * of the party offering the same. If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate or to continue to participate in such fund the court shall certify such finding or verdict to the industrial commission and the commission shall thereupon order compensation to be paid in the manner pro-

vided by this act for the payment of other awards, and such certificate of the court shall be entered in the records of judgments of such court and shall for the purpose of error proceedings, be in lieu of final judgment in such cause but notwithstanding the judgment rendered, the commission may modify or revoke a finding that the claimant is permanently and totally disabled if it finds on evidence that the claimant is thereafter capable of doing work.

No such certificate shall be placed upon the record of judgments until such certificate has been submitted to the attorney general and no entry except an entry setting forth the trial of the case and the verdict of the jury shall be placed upon the record of the court until such entry has been so submitted.

The cost of any legal proceedings, authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party; provided, however, that such attorney fee shall not exceed twenty per cent of any award up to the sum of five hundred dollars, and 10 per cent on all amounts in excess thereof, but in no event shall such fee exceed the sum of five hundred dollars. Either party in any of such proceedings shall have the right to prosecute error as in the ordinary civil cases, *provided that in any such proceedings the transcript of the record of rehearing before the industrial commission need not be rewritten in the bill of exceptions but the transcript of said record may be attached to and made a part of said bill of exceptions and the rulings of the court with respect to exclusion or admission of evidence shall be shown on the margin of the pages of said transcript on which objections and motions appear.* Such right of rehearing before the commission and of appeal from the decision of the commission on such rehearing where such decision denies compensation to a claimant on the grounds hereinbefore specified, shall apply to a claimant in cases in which an employer is a contributor to the state insurance fund or has elected to compensate his employees directly under the provisions of section 1465-69, or has failed and neglected to comply with the provisions of section 1465-69. (As amended 120 O. L. 449, 459. Eff. 6-15-43.)

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 684.

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLEE.

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Supreme Court of the United States

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No. 684.

COPPERWELD STEEL COMPANY,
Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Since the statement of the case is set out in appellee's brief, no restatement thereof is deemed necessary herein.

QUESTIONS PRESENTED.

1. Is the question presented a federal question for the Supreme Court of the United States to consider?

2. Did the decision of the Supreme Court of Ohio on the demurrer to appellant's petition and amendment thereto constitute a deprivation of property without due process of law or a denial of the equal protection of the laws?

3. Has the appellant such a financial interest in the state insurance fund of Ohio that it can be heard to complain with respect to the distribution thereof?

SUMMARY OF ARGUMENT.

1. The Supreme Court is without jurisdiction to review this case for the following reasons: (1) there was not drawn in question the validity of a statute of the state of Ohio on the ground of its being repugnant to the Constitution of the United States; (2) a federal question was not drawn into question in the Supreme Court of Ohio; (3) the decision of a federal question was not necessary to the determination of the issues before the Supreme Court of Ohio; (4) the Supreme Court of Ohio rendered judgment without deciding a federal question.

2. The refusal of the Supreme Court of Ohio to grant the relief prayed for in appellant's petition and the amendment thereto, and the construction placed upon Section 871-38 of the General Code of Ohio by said court, does not operate to deprive the appellant of its property without due process of law or deny to it the qual protection of the laws.

3. The payment of the death benefits and compensation for injuries awarded by the appellee will not violate any constitutional rights secured to the appellant by the due process and equal protection clause of the Fourteenth Amendment to the Federal Constitution. The appellant has no financial interest in the state insurance fund and consequently the Ohio Supreme Court's refusal to enjoin distribution of moneys from such fund did not deprive appellant of any property without due process of law.

ARGUMENT.

I.

There Is No Federal Question Presented to the Supreme Court of the United States to Consider.

The record in this case discloses that the sole ground upon which the appellant relies to sustain the appellate jurisdiction of the Supreme Court of the United States is that the Supreme Court of Ohio sustained a demurrer to a petition and amendment thereto filed by it in an original action in said court, in which petition and amendment it is alleged that unless certain orders of the appellee are vacated, prohibited and enjoined, the appellant will be deprived of its property without due process of law and will be denied the equal protection of the laws. (R., 7, 22.)

Appellant, in the petition and amendment to the petition filed by it in the Supreme Court of Ohio, did not bring into question the validity of any statute of Ohio on the ground of its being repugnant to the Constitution of the United States, nor was such issue raised by appellee's demurrer. The sole questions presented to the Supreme Court of Ohio, after giving the petition and its amendment an interpretation most favorable to the appellant, were whether or not appellant had a right of appeal to the Supreme Court of Ohio under the provisions of Section 871-38 of the General Code of Ohio, and whether either prohibition or mandamus would lie against the appellee with respect to the relief sought.

The first of these questions was disposed of by reference to previous decisions of the court on the precise question. In regard thereto, it was stated in the opinion of the court by Williams, J. (R., 15):

> "Counsel for plaintiff request re-examination of our previous construction of that provision. It was early held that an employee could not bring a proceeding under that section for the allowance of compensation in addition to that which had previously been allowed. **Gatton v. Industrial Commission,** 93 Ohio St., 203, 112 N. E., 503. Recently it was decided that an employer has no right to have an order, fixing a premium rate, reviewed under this provision. **United States Wall Paper Co. v. Industrial Commission,** 132 Ohio St., 372, 7 N. E. (2d), 798. Since the decision in the **Gatton case** there have been many other decisions construing this section. It is now the established rule that its provisions do not confer upon this court power to review orders of the Industrial Commission allowing claims for injury or death arising out of or suffered in the course of employment but apply only to matters pertaining to the safety code. Orders reviewable thereunder are such as 'relate to places of employment and to safeguards touching the life, heath, and safety of employees.' **Pittsburgh Coal Co. v. Industrial Commission,** 108 Ohio St., 185, 188, 140 N. E., 684. **United States Wall Paper Co. v. Industrial Commission,** supra. In the two latter reported cases citations to other decisions may be found. Upon re-examination of the question we approve and follow the established rule that orders made by the Industrial Commission under the Workmen's Compensation Law are not reviewable under Section 871-38, General Code."

The meaning attributed by the highest court of a state to a statute of the state must be accepted by the United States Supreme Court, on review, as though it had been specifically expressed in the statute.

Quong, Ham, Wah Co. v. Industrial Accident Commission of California, 255 U. S., 445;
Supreme Lodge, Knights of Pythias, v. Meyer, 265 U. S., 30;
Saltonstall v. Saltonstall, 276 U. S., 260;
Senn v. Tilelayers Protective Union, 301 U. S., 468.

With respect to the other questions presented to it, the Supreme Court of Ohio said (R., 16):

"The plaintiff in its petition has not indicated exactly what kind of a writ is sought. It might be either injunction, prohibition or mandamus. Plaintiff's counsel do not specifically urge that injunction will lie but do ask for a writ 'enjoining the defendant.' Therefore, we give passing consideration to the applicability of the injunctive remedy. This court has power to grant an injunction **pendente lite** as ancillary to a cause of which it has jurisdiction, in order to preserve matters in **statu quo**. However, as to chancery cases in which an injunction is sought as a final remedy, original jurisdiction is vested by statute in the Court of Common Pleas. The Supreme Court has, under the Constitution, no original jurisdiction to afford such relief in chancery.

Counsel for plaintiff do contend that this action is 'in prohibition.' Prohibition is a remedy calculated to keep inferior tribunals from usurping power with which they have not been invested. It must be borne in mind that it is not sought herein to prevent a merit rating of a complying employer as was the case in **State, ex rel. Powhatan Mining Co. v. Industrial Commission**, 125 Ohio St., 272, 181 N. E., 99, 82 A. L. R., 938, but to control the action of the Industrial Commission with respect to the allowance or disallowance of certain claims. The power to hear claims and award death benefits and compensation for injuries has been expressly conferred upon the commission by Section 1465-90, General Code, and prohibition will not lie to curb the exercise of that power or to prevent the enforcement of a valid award after it has been made

upon claims properly before it, as were the claims in the case at bar.

Do facts pleaded state a cause of action in mandamus? Mandamus is frequently employed to keep the Industrial Commisison within legal bounds. The writ's use is limited to compelling the performance of a duty specially enjoined by law whether the failure to perform the duty results from an abuse of discretion, a violation of law, or otherwise."

The Construction Placed Upon Section 871-38 of the General Code of Ohio by the Supreme Court of Ohio to the Effect That Said Section Does Not Grant to the Appellant the Right to Have the Order of the Appellee Reviewed by Said Court, Does Not Deprive Appellant of Property Without Due Process of Law.

Appeals, rehearings, or judicial reviews are not essential to due process of law either in judicial or administrative proceedings.

James v. Appel, 192 U. S., 129;
Reetz v. Michigan, 188 U. S., 505;
Pittsburgh, C., C. and St. L. R. Co. v. Backus, 154 U. S., 421;
Andrews v. Swartz, 156 U. S., 272;
Twining v. New Jersey, 211 U. S., 78.

The power to render a final judgment must be lodged somewhere and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state, for right of appeal is not essential to due process of law.

Standard Oil Co. v. Missouri, ex rel. Hadley, 224 U. S., 270.

There is no provision in the federal Constitution which forbids a state from granting to a tribunal, whether called

a court, board or commission, the final determination of a legal question. **Reetz v. Michigan**, 188 U. S., 505. No right to litigate the same question twice is guaranteed by the due process clause of the Fourteenth Amendment. The right of review in an appellate court is purely a matter of state concern; a denial of a right of appeal altogether would constitute no violation of the federal Constitution.

Kohl v. Lehlbach, 160 U. S., 293;
Baldwin v. Iowa State Traveling Men's Association, 283 U. S., 522.

Consequently, the Ohio Supreme Court's construction of a statute under which the appellant claimed the right to a review of the order of the appellee in the Supreme Court of Ohio, did not deprive appellant of its property without due process of law.

Moreover, the refusal of a writ of prohibition by the Supreme Court of Ohio was not a denial of due process. Prohibition is a preventive writ, designed to prevent a tribunal from proceeding in a matter which it is not authorized to hear and determine or in which it seeks to usurp or exercise a jurisdiction with which it has not been invested by law. **Marsh v. Goldthorpe**, 123 O. S., 103. The purpose of the writ of prohibition is to keep inferior courts or inferior tribunals, ministerial or otherwise, that possess an incidental judicial or quasi judicial power within the limits of their own jurisdiction. **State, ex rel. Nolan, v. ClenDening**, 93 O. S., 264; **State, ex rel. McCrehen, v. Brown**, 108 O. S., 454. Since the appellee is invested with power to hear claims and award death benefits and compensation for injuries and inasmuch as said death benefits and compensation for injuries had already been

awarded, nothing remained to be done save the ministerial act of paying the same, a writ of prohibition was properly denied by the Supreme Court of Ohio.

Likewise, since the appellant was seeking to **enjoin** the appellee from performing an act, purely ministerial in character, it can scarcely be contended that the Supreme Court of Ohio erred and in doing so deprived the appellant of due process by refusing to issue a writ of mandamus **compelling** the appellee to perform an act.

It is therefore respectfully submitted that a federal question was not presented for decision to the Supreme Court of Ohio and that a decision of a federal question was not necessary to the determination of the cause, and consequently this Honorable Court has no jurisdiction to review the decision of the Supreme Court of Ohio.

II.

The Jurisdiction of the Supreme Court of Ohio is Conferred by Section 2, Article IV of the State Constitution and the Limitations of That Jurisdiction Do Not Empower the Supreme Court of Ohio to Grant the Relief Suggested by the Appellant's Petition and Amendment Thereto; Thus, the Refusal of the Lower Court to Grant Appellant the Relief Prayed For Did Not Deprive it of Property Without Due Process of Law, Nor Did it Deny to it the Equal Protection of the Laws.

Neither the allegations of the appellant's petition in the lower court, nor those of the amendment thereto, reveal the kind of relief that appellant is seeking. After alleging that the four injured workmen and the dependents of the two killed workmen were allowed compensation and death benefits respectively, after a hearing upon the applications for reconsideration filed by the appellant, the plaintiff in the lower court alleged the circumstances of the accident of November 13, 1941, and set forth that the orders of the appellee were "unreasonable and unlawful" for eight reasons which are enumerated. The appellant continues to state that said orders are "contrary to law, constitute a gross abuse of discretion, if any, and of the power and authority, of the defendant and are beyond the jurisdiction of the defendant." Thereupon, the appellant states that "the aforesaid orders of the commission unless vacated, prohibited or enjoined will result in the merit, or individual, rating of the plaintiff's workmen's compensation risk to the prejudice of plaintiff, and in unlawfully charging and collecting from the plaintiff premiums therefor in excess

of those which should and may legally be charged and collected." For this reason, it says that unless the orders of the commission are "vacated, prohibited or enjoined" it will be deprived of "its property without due process of law" and will be denied "the equal protection of the laws." (R., 6, 7.)

The amendment to the petition states additional circumstances of the accident of November 13, 1941, and alleges that "the plaintiff * * * has a direct financial interest, to the extent of $20,008.62, plus the amount of additional premiums based on such claims in future years, in the unreasonable and unlawful allowance of the claims allowed herein and the distribution of the state insurance fund on account thereof." (R., 20, 21, 22.)

The prayer of the petition, which is renewed in the amendment thereto, asks for rather sweeping relief, namely: "(1) That the 'orders of the Industrial Commission be set aside, vacated and reversed; that the * * * claims and each of them be disallowed; (2) that a writ issue prohibiting and enjoining the defendant from continuing such orders or any of them in effect, from making any payments thereunder, from taking into consideration any payments which may have been made thereunder in the merit or individual rating of the plaintiff's workmen's compensation risk, and requiring the defendant to vacate such orders and disallow such claims; and (3) for all such further relief to which the plaintiff may be entitled."

The nebulous nature of the allegations of the petition and the prolixity of the prayer, of course, constrained the Supreme Court of Ohio to examine the Constitution of Ohio (Section 2 of Article IV) to discover whether the petition, the amendment thereto, and the prayer invoked the

jurisdiction conferred upon it by the fundamental law of the state.

This inquiry by the court into its own jurisdiction resulted in the conclusions announced in its two opinions (R., 12, 23) to the effect that plaintiff's petition and the amendment thereto did not invoke its jurisdiction as conferred upon it by the Constitution of Ohio. **This is the full extent and import of the judgment of the Supreme Court of Ohio dismissing appellant's petition and entering final judgment in behalf of the appellee.** The lower court, therefore, did not arrive at the point where it could consider whether any statute of Ohio was violative of the federal Constitution, because it **first** concluded that the facts set forth in appellant's petition did **not** raise any controversy the adjudication of which came within the constitutional limitations of its jurisdiction.

All that the appellant sought to achieve by instituting this action in the Supreme Court of Ohio was a judicial review of the decision of the appellee. The fact that such review was denied it and that the question of whether or not the appellee abused is discretion or usurped its jurisdiction was not considered by the Supreme Court of Ohio, lends no support to the claim made by the appellant that it was deprived of its property without due process of law and denied equal protection of the laws. Certainly, the appellant cannot be heard to say that it has been denied due process merely because in an action improperly instituted by it a court properly denied jurisdiction. Where a remedy exists to obtain relief from arbitrary or oppressive conduct of an administrative tribunal it can scarcely be contended that due process of law has been

denied to a person who fails to avail himself of such remedy, or chooses an improper mode in pursuing the same.

In **Louisville & Nashville Railway Company v. Garrett,** 231 U. S., 298, a Kentucky statute under which the railroad commission of that state was authorized to establish rates was under consideration by this Honorable Court. The statute and the action of the commission taken thereunder was attacked as violative of the rights secured to the railroad company by the federal Constitution. It was insisted that the failure to provide for an appeal to any court from the final order of the commission, or for a judicial review of the reasonableness of the prescribed rates before they became effective, made the statute void, and that, therefore, it operated to deprive the carrier of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the federal Constitution.

In answer thereto, Mr. Justice Hughes in delivering the opinion of the court, declared (beginning at page 311):

> "But the statute does not deny to the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry. We have not been referred to any decision of the state court holding that the statute should be so construed (Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S., 418, 456, 33 L. Ed., 970, 980, 3 Inters. Com. Rep., 209, 10 Sup. Ct. Rep., 462, 702). If the commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S., 418, 459, 460, 33 L. Ed., 970, 982, 983, 3 Inters. Com. Rep., 209, 10 Sup. Ct. Rep., 462, 702; St. Louis & S. F. R. Co. v. Gill, 156 U. S., 649, 659, 666, 39 L. Ed., 567, 570, 573, 15 Sup. Ct. Rep., 484; Ex Parte Young, 209 U. S., 123, 166, 52 L. Ed., 705, 731,

13 L. R. A. (N. S.), 932, 28 Sup. Ct. Rep., 441, 14 Ann. Cas., 764. Presumably, the courts of the state, as well as the federal courts, would be open to the carrier for this purpose (Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S., 265, 278, 53 L. Ed., 176, 184, 29 Sup. Ct. Rep., 50) without express statutory provision to that effect."

An examination of the pronouncement of this Honorable Court in the above case impels us to inquire: Has the appellant referred us to a decision of the state courts of Ohio holding that the Workmen's Compensation Act of that state should be construed so as to deny it access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry?

Clearly, if the appellee in determining that the injuries involved occurred in the course of and arising out of the workmen's employment, usurped its jurisdiction, and acted arbitrarily, an appropriate mode of obtaining relief was open to him. The fact that the Supreme Court of Ohio held that a particular statute did not provide for a judicial review of the order made by the appellee certainly forms no basis for the argument that appellant is denied access to the courts of that state, nor can it be heard to complain because the Supreme Court of Ohio concluded that its original jurisdiction in prohibition and mandamus cannot properly be invoked to afford the relief sought.

III.

Even Though Appellant Had Instituted the Proper Action in a Court Having Jurisdiction to Afford the Relief Prayed For, Such Court Could Not Have Determined That the Payment of the Awards Made by the Appellee Would Deprive Appellant of Its Property Without Due Process of Law or Deny It the Equal Protection of the Law.

The pertinent sections of the Workmen's Compensation Law of Ohio, as the same were in effect at the time the claims involved herein were filed, provided that the Industrial Commission maintain a state insurance fund (Section 1465-53; App., p. 29); that every person defined as an employee therein (Section 1465-61; App., p. 30) or his dependents, shall be entitled to receive from the state insurance fund compensation or death benefits (Section 1465-68; App., p. 31); that the commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon shall be final, except as provided in Section 1465-90 (Section 1465-90; App., p. 33). This latter section enumerates nine grounds for denial of compensation by the Industrial Commission which entitle the workman, or his dependents, to a rehearing. The section then sets forth that subsequent to the rehearing thus provided for, the commission shall again consider the claim and if the claim is again denied on any of the same nine grounds enumerated, then the workman, or his dependents, are entitled to an appeal to the Common Pleas Court where the right to participate in the state insurance fund may be pursued in accordance with the rules

of civil procedure. The rules of civil procedure of course give access to the appellate procedure provided for in the fabric of the general state law.

A canvass of these and other sections of the Workmen's Compensation Act reveals that an employer who has complied with the provisions of the act has no interest whatever in the distribution of the state insurance fund. His interest lies only in the creation of that fund, and that interest is confined to the amount of premiums he pays in the future. This principle is discussed by the Supreme Court of Ohio in the interlocutory opinion where Williams, J., in speaking for the court, says:

> "The complying employer has no direct financial interest in the distribution of the state insurance fund. His interest lies in basic and merit ratings and the amount he is required to pay in premiums. With respect to the subject matter involved in a proceeding upon a claimant's application for compensation under Section 1465-90, General Code, the complying employer's interest is remote." (R., 16, 17.)

Again, in the final opinion of the Supreme Court of Ohio, Williams, J., speaks for the court as follows:

> "In considering the question of due process and equal protection of the laws it is necessary to have in mind that a complying employer is not a necessary or a proper party to the proceeding under Section 1465-90, General Code, for the allowance of compensation. That statute does not provide for his being brought in. His only direct financial interest is, not in the distribution of the fund or in the fund itself, but in the creation of it, that is, in the amount of premiums he pays in the future. Since he has no interest in the fund or its distribution and is not even a proper party to the proceeding, he is not denied a constitutional right by the allowance of a claim for compensation. He is not aggrieved, if at all, until the commission applies 'that form of rating system which, in its judgment, is best

> calculated to merit or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident experience and to encourage and stimulate accident prevention,' pursuant to Section 1465-54, paragraph 3 (formerly paragraph 4), General Code. When action is taken in merit rating, which determines the amount of premiums an employer is required to pay, then for the first time his financial interest is affected."

It thus becomes apparent that the jurisdiction of the commission in so far as it concerns awards made to injured workmen or their dependents is quite separate and distinct from an employer's interest in the premiums he may be required to pay into the fund at some future date. Appellant's obligation to pay increased premiums into the state insurance fund on account of the merit rating system provided for in Section 1465-54, General Code of Ohio, **does not necessarily flow from the adjudication of the commission that an award be made to an injured workman or his dependents.** It must be remembered that the action sought to be brought in the Supreme Court of Ohio was not one in which the appellant sought to prevent a wrongful application of the merit rating system as was true in **State, ex rel. Powhatan Mining Company, v. Industrial Commission**, 125 O. S., 272, but, to the contrary, it was an effort on the part of the appellant to prematurely forestall any adverse merit rating calculation by interfering with the complete discretion invested in the Industrial Commission to adjudicate the claims of injured workmen or their dependents as clearly provided for in Section 1465-90, General Code of Ohio.

The purpose of the Workmen's Compensation Act is to reimburse for impairment of earning capacity without the uncertainties of litigation and the attendant delays, risks,

and expenses. In other words, it provides a cheap and expeditious remedy which could hardly be afforded by the average workman if he were compelled to engage in protracted and expensive litigation which might be induced by the superior financial resources of his employer. **Industrial Commission v. Drake**, 103 O. S., 628. If in each case the employer could circumvent the favorable consideration by the commission of the employee's claim by questioning the jurisdiction of the commission under Section 1465-90, General Code of Ohio, to make the award, then is it clear beyond cavil that every claim could be made, not a cheap and expeditious adjudication by the Industrial Commission, but a contest between the employee and his employer as to whether or not he should receive compensation. Surely, this is not the purpose of Workmen's Compensation Law and the validation of such a form of procedure would vitiate the claimant's rights under Section 1465-90, General Code, and would deprive him of his day in court by way of hearing, rehearing, and appeal to the Common Pleas Court, Court of Appeals, and Supreme Court. The impropriety of such a conclusion is emphasized by the fact that it is not at all necessary for an employer to attack an employee's right to an award in order to protect his prospective financial interest in the state insurance fund.

Furthermore, even though the appellant had instituted a proper action in a court having jurisdiction to afford the relief prayed for, on the ground that the appellee had arbitrarily and unlawfully exceeded its jurisdiction, it seems evident that such court would be constrained to find that as long as the commission had construed the phrase "in the course of employment" in substantial conformity with

the pronouncements of the Supreme Court of Ohio and the Courts of Appeals thereof, it could not be accused of acting without its jurisdiction.

Section 35 of Article II (App., p. 25) of the Constitution of Ohio provides that "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed * * *." Pursuant to this constitutional authority, the term "injury" as contemplated by the Workmen's Compensation Act is defined in Section 1465-68, General Code of Ohio, as follows:

> "The term 'injury' as used in this section and in the Workmen's Compensation Act shall include any injury received in the course of, and arising out of, the injured employee's employment."

Pursuant to Section 35 of Article II of the Constitution of Ohio and Section 1465-68, General Code of Ohio, the term "injury" has been construed a number of times by our state courts.

In **Industrial Commission of Ohio v. Barber**, 117 O. S., 373, the syllabus reads as follows:

> "1. An employe, who for the purpose of reaching his place of employment travels a course which affords the only unobstructed access thereto, enters upon the course of his employment within the contemplation of the Workmen's Compensation Law when he reaches the zone of such employment that is under the control of his employer, even though such zone be outside the inclosure of his employer.
>
> 2. The hazards of such zone growing out of the conditions and environments of his employment are hazards of his employment, and an injury received by an employe due to such hazards is compensable out of the industrial insurance fund of the Workmen's Compensation Law."

In **Industrial Commission of Ohio v. Henry**, 124 O. S., 616, the syllabus reads as follows:

"1. Where the claimant's decedent had entered upon his employment in the early morning hours, had left the premises of the employer to get his breakfast at a restaurant, in accordance with a custom acquiesced in by the employer, and, while returning to the premises of the employer by a direct and necessary route along a public thoroughfare, was struck by a train running upon the tracks of a railroad so immediately adjacent to the premises of the employer that the only way of ingress and egress toward the restaurant was one of hazard, the accident arose out of and in the course of the decedent's employment.

2. In such case, upon trial of an appeal from a denial of compensation by the Industrial Commission upon jurisdictional grounds, it is not reversible error for the trial court to charge that the jury should take into consideration the nature of the employment, the hours of service required of the decedent, the nature and condition of the premises where the deceased was employed, and of the premises surrounding the same, the natural and ordinary conduct of persons so employed during such hours while acting in such employment."

The syllabus of **Spellman v. Industrial Commission of Ohio**, 73 O. App., 369, reads as follows:

"Where an automobile, in which two employees were riding, was struck by a cut of freight cars being switched on railroad tracks contiguous to the employer's premises at a time when such employees were about to enter the premises to commence their day's work, the one employee's death and the other's injury, resulting from such accident, arose out of and in the course of their employment within the meaning of the Workmen's Compensation Act, since the tracks were so immediately adjacent to the employer's premises that the only way of ingress and egress to the latter was one of hazard and inasmuch as such tracks were in such proximity to the premises that the former may

> be said, under all the circumstances, to be within the zone of such employees' employment."

An examination of the above pronouncements reveals that the Industrial Commission, in allowing the claims growing out of the injuries involved in the case at bar, did not depart in any substantial manner from the construction of the term "in the course of, and arising out of, the injured employee's employment" as enunciated by the courts of the state.

It is too well-established to require extensive citation that this Honorable Court will not disturb the construction attributed to a state statute by the courts of that state.

In **Des Moines National Bank v. Fairweather**, 263 U. S., 103, the court said:

> "We are asked to go into the proper construction of the state statute and its validity under the state Constitution. But these are questions of local law, the decision of which by the Supreme Court of the state is controlling."

Moreover, the Supreme Court of the United States, in **Cudahy Packing Company v. Parramore**, 263 U. S., 418, in construing the provisions of the Utah Workmen's Compensation Act, which provides for the payment of compensation for personal injury or death of an employee by accident "arising out of or in the course of his employment," found in the first branch of the syllabus as follows:

> "A decision of a state court that the Workmen's Compensation Act of the state applies to injuries occurring to an employee on his way to work before the hour for beginning work has arrived is binding on the Supreme Court of the United States."

Mr. Justice Sutherland, in delivering the opinion of the court in **Cudahy Packing Company v. Parramore**, states:

> "It is settled by the decisions of this court and by an overwhelming array of state decisions, that such statutes are not open to constitutional objection because they abrogate common-law defenses or impose liability without fault. But the contention here, shortly stated, is that the accident was one which occurred off the premises of the employer, on a public road, outside the hours of employment, and while the employee was not engaged in any business of the employer; that it was not the result of any industrial risk, but arose from a common peril to which the public generally was exposed; and that consequently liability is imposed arbitrarily and capriciously. It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution; but where the accident has any such relation we should be cautious about declaring a state statute creating liability against the employer invalid upon that ground. The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common-law liability of the master for personal injuries to a servant, leaving, of necessity, a field of debatable ground where a good deal must be conceded in favor of forms of legislation calculated to establish new bases of liability more in harmony with these changed conditions."

Mr. Justice Sutherland then very pointedly states:

> "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital,

> —the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. * * * The fact that the accident happens upon a public road or at a railroad crossing, and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree."

An analysis of the Parramore decision would seem to indicate that if this Honorable Court had the proper opportunity to review the reasonableness of the decision of the Industrial Commission of Ohio in the claims involved in the case at bar, the doctrine enunciated in **Cudahy Packing Company v. Parramore**, supra, would impel the court to the conclusion that the Industrial Commission of Ohio had acted well within the jurisdiction conferred upon it by the Constitution and statutes of that state.

IV.

Appellant is Not Denied the Equal Protection of the Laws.

While not strenuously pressed by it, the appellant suggests in his brief (pp. 11, 12, 38) that it is denied the equal protection of the laws by reason of the fact that the so-called "self-insuring employers" and "non-complying employers" have a legal right to a judicial determination of the question as to whether or not the injury or death occurred in the course of and arose out of the employment, while the complying employer has no right to a judicial review of the order of the Industrial Commission awarding compensation.

In this connection it must be borne in mind that when an award for compensation is made to an employee of a self-insuring employer or non-complying employer, such employer is required by law to pay the full amount of the award, while a complying employer, in the event an award is made to one of his employees, has no such obligation.

True, any compensation or death benefit paid from the state insurance fund on account of an injury or the death of an employee the latter employer might or might not result in an increase in the rate of such employer's premium. However, if such increase does result from the payment of an award wrongfully made by the Industrial Commission, such employer, as pointed out by Judge Williams in the opinion of the court below "could refuse to pay the premium assessed against him, and upon suit to recover the same, make his defense if any he has."

It is therefore apparent that there is furnished to each type of employer an appropriate method of obtaining re-

lief against an unlawful assessment, whether such assessment be for the full amount of compensation awarded or for the premium claimed to be due the insurance fund.

CONCLUSION.

In conclusion, it is respectfully submitted that a federal question was not drawn into this case before the Supreme Court of Ohio, nor was it necessary for such court in determining all of the issues presented to it by the pleadings, to decide a federal question.

The Ohio Supreme Court's construction of the Ohio statute under which the appellant claims a right to a judicial review of the action taken by the appellee in making the awards involved herein, does not deprive the appellant of his property without due process of law; nor does such court's refusal to prohibit and enjoin distribution from the state insurance fund on the appellant's application therefor by prohibition and mandamus, deny to appellant any rights given him by the "due process" and "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX A.

Extracts from the Constitution of Ohio and the Workmen's Compensation Act of Ohio.

Article II, Section 35 of the Constitution of Ohio.

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, in so far as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases.

Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

Article IV, Section 2 of the Constitution of Ohio.

The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges, and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, except as hereinafter provided. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving

questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The judges of the supreme court shall be elected by the electors of the state at large for such term, not less than six years, as may be prescribed by law, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law. Whenever the judges of the supreme court shall be equally divided in opinion as to the merits of any case before them and are unable for that reason to agree upon a judgment, that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the court below. No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void. In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals. All cases pending in the supreme court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law. No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

Section 871-38, General Code of Ohio.

Any employer or other person in interest being dissatisfied with any order of the commission may commence an action in the supreme court of Ohio, against the commission as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the supreme court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The commission shall be served with summons as in other civil cases.

The answer of the commission shall be filed within ten days after service of summons upon it and with its answer it shall file a certified transcript of its record in said matter. Upon the filing of said answer said action shall be at issue and shall be advanced and assigned for trial by the court, upon the application of either party, at the earliest possible date.

Section 1465-44, General Code of Ohio.

The board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof, in cases of accident and injury to employes, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made.

Section 1465-53, General Code of Ohio.

The industrial commission of Ohio shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide an adequate fund for the compensation provided for in this act, and to maintain a state insurance fund from year to year, provided, however, that where the payroll cannot be obtained or, in the opinion of the commission, is not an adequate measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such oher basis, consistent with insurance principles, as shall be equitable in view of the degree of hazard, and whenever in this sub-chapter reference is made to payroll or expenditure of wages with reference to fixing premiums such reference shall be construed to have been made also to such other basis for fixing the rates of premium as the commission may in the foregoing instances determine. Nothing herein shall be construed to prohibit the industrial commission from establishing a minimum premium for different classes, which minimum premium shall be the lowest advance or adjusted premium amount for which a certificate entitling the employer to protection under the workmen's compensation law may be issued, for a six months' period or any part thereof, regardless of payroll amount and notwithstanding any of the provisions of section 1465-55, paragraph 3.

Section 1465-61, General Code of Ohio.

The term "employee," "workman" and "operative" as used in this act shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to police or firemen in cities where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds which are now or hereafter may be established and maintained by municipal authority under existing laws, unless the amount of the pension funds provided by municipal taxation and paid to such police or firemen shall be less than they would have received had the municipality no such pension funds provided by law; in which event such police and firemen shall be entitled to receive the regular state compensation provided for police and firemen in municipalities where no policemen's or firemen's pension funds have been created under the law; less, however, the sum or sums received by the said policemen or firemen from said pension funds provided by municipal taxation, and the sum or sums so paid to said policemen or firemen from said pension funds shall be certified to the industrial commission of Ohio by the treasurer or other officer controlling such pension funds.

2. Every person in the service of any person, firm or private corporation, including any public service corpora-

tion, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.

3. Every person in the service of any independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as provided in section 1465-69, General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

Section 1465-68, General Code of Ohio.

Every employee mentioned in section 1465-61, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on and after January 1st, 1914, shall be entitled to receive, either directly from his employer as provided in section 1465-69, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medi

cines, and such amount of funeral expenses in case of death as provided by sections 1465-79 to 1465-87 inclusive.

Whenever, with respect to an employee of an employer who is subject to and has complied with the provisions of this act, there is possibility of conflict with respect to the application of workmen's compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in different states, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed. Such agreement shall be in writing and shall be filed with the industrial commission of Ohio within ten days after it is executed and shall remain in force until terminated or modified by agreement of the parties similarly filed. If the agreement is to be bound by the laws of this state and the employer has complied with the provisions of this act, then the employee shall be entitled to compensation and benefits regardless of where the injury occurred or the disease was contracted and the rights of the employee and his dependents under the laws of this state shall be exclusive remedy against the employer on account of injury, disease or death in the course of and arising out of his employment. If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and his dependents under the laws of that state shall be the exclusive remedy against the employer on account of injury, disease or death in the course of and arising out of his employment without regard to the place where the injury was sustained or the disease contracted.

If any employee or his dependents shall be awarded workmen's compensation benefits or shall recover damages from the employer under the laws of another state, the amount so awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or his dependents by the industrial commission of Ohio.

If an employee is a resident of a state other than this state and is insured under the workmen's compensation act or similar acts of a state other than this state, such employee and his dependents shall not be entitled to receive compensation or benefits under the provisions of this act on account of injury, disease or death arising out of or in the course of employment while temporarily within this state and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on account of such injury, disease or death.

The term "injury" as used in this section and in the workmen's compensation act shall include any injury received in the course of, and arising out of, the injured employee's employment.

Section 1465-90, General Code of Ohio.

The commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon, shall be final, except as provided in this section. The commission shall definitely and specifically pass upon each and every issue raised in the claim, necessary for a proper and complete decision thereon. In all claims for compensation on account of injury, or

death resulting therefrom, if the commission denies the right of the claimant to receive compensation or to continue to receive compensation the order of the commission shall state the ground or grounds on which the claim was denied; and if the claim was denied on any of the following grounds: that the injury was self-inflicted; that the injured person was not an employe; that the injury did not occur in the course of or arise out of the employment; that the claimant's disability is not the result of the injury; that the claimant having received compensation for the period of temporary total disability and having received the maximum amount of compensation for temporary partial disability as provided in this act, and having engaged in no gainful occupation for the period of four years prior to the decision of the commission, during which time compensation has been payable to such claimant, is not permanently and totally disabled as a result of the injury; that the death did not result from the injury; that the claimant was not legally or actually dependent upon the decedent; or that the employer was not amenable to the law; then the claimant may within thirty days after receipt of notice of such finding of the commission, file an application with the commission for a rehearing of his claim, whereupon the former action of the commission thereon shall be vacated. If the order of the commission does not state the ground or grounds on which the claim was denied, or if the order of the industrial commission is not definite in such regards, the claimant may maintain an action in mandamus against the commission in the supreme court of Ohio, and, if the final order in such proceedings directs the commission to state the ground or

grounds of its order or make the order definite as to the ground or grounds thereof, then there shall be taxed as part of the costs assessed against the commission an attorney fee in the amount of $250.00. The commission shall fix a date for rehearing of such claim and give the claimant and his employer at least one week's prior notice thereof; at said hearing, if the claimant is asking for compensation from the state fund, the attorney general, or any one or more of his assistants or special counsel who have been designated by him to act as attorney to the commission, may represent the state fund, and in the absence of the attorney general or his designated assistants or special counsel, the commission shall elect one or more of the attorneys in the employ of the industrial commission to represent the state fund. Such hearing shall be had and the evidence for and against the allowance of the claim submitted as in the trial of civil actions. The commission shall pass upon the admissibility of evidence, but either party may at the time make objection and take exception to the rulings of the commission thereon, and if the commission refuses to admit any evidence, the party offering the same shall state the nature of such evidence and the matter which such party proposes to prove thereby, and such statement shall be made a part of the record of such rehearing. Such rehearing may be continued from time to time.

If the commission, after such hearing denies the right of the claimant to receive or to continue to receive compensation it shall state the ground or grounds on which the claim was denied and if the claim was denied on any of the grounds hereinabove specifically stated then the claimant, within sixty days after receipt of notice of such action

of the commission, may file a petition in the common pleas court of the county wherein the injury was inflicted, or in the common pleas court of the county wherein the contract of employment was made in cases where the injury occurs outside the state of Ohio. If the claimant is seeking compensation from the state insurance fund, the defendant in such action shall be the industrial commission and summons shall be issued to the industrial commission and also to the attorney general. If the claimant is seeking compensation from an employer who has qualified to pay compensation direct, as provided by section 1465-69 or from an employer who has failed to comply with this act, the defendant in such action shall be such employer and summons shall issue to such employer. Further pleadings shall be had in accordance with the rules of civil procedure. The attorney general shall designate one or more of his assistants or special counsel to act as counsel for the commission and he shall call upon the prosecuting attorney of the county in which the suit is pending to render such assistance in connection therewith as he, the attorney general, may deem necessary; and if, for any reason at any stage of such proceeding, the attorney general, his assistants or special counsel do not appear for or represent and defend the commission, the commission shall select one or more of the attorneys in the employ of the industrial commission to represent the commission.

Within ten days after the filing of the answer the indutrial commission shall certify to such court a transcript of the record of such rehearing, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to par-

ticipate or to continue to participate in such fund upon the evidence contained in such record and no other evidence; but the court may exclude from evidence such portions of the transcript which are not competent, material or relevent evidence and to which objection was made or/and exception taken at such rehearing before the commission and may admit in evidence such competent, material or relevant evidence as was excluded by the commission at such rehearing, over the objection and exception of the party offering the same. If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate or to continue to participate in such fund, the court shall certify such finding or verdict to the industrial commission and the commission shall thereupon order compensation to be paid in the manner provided by this act for the payment of other awards, and such certificate of the court shall be entered in the records of judgments of such court and shall for the purpose of error proceedings, be in lieu of final judgment in such cause but notwithstanding the judgment rendered, the commission may modify or revoke a finding that the claimant is permanently and totally disabled if it finds on evidence that the claimant is thereafter capable of doing work.

No such certificate shall be placed upon the record of judgments until such certificate has been submitted to the attorney general and no entry except an entry setting forth the trial of the case and the verdict of the jury shall be placed upon the record of the court until such entry has been so submitted.

The cost of any legal proceedings, authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against

the unsuccessful party; provided, however, that such attorney fee shall not exceed twenty per cent of any award up to the sum of five hundred dollars, and 10 per cent on all amounts in excess thereof, but in no event shall such fee exceed the sum of five hundred dollars. Either party in any of such proceedings shall have the right to prosecute error as in the ordinary civil cases. Such right of rehearing before the commission and of appeal from the decision of the commission on such rehearing where such decision denies compensation to a claimant on the grounds hereinbefore specified, shall apply to a claimant in cases in which an employer is a contributor to the state insurance fund or has elected to compensate his employes directly under the provisions of section 1465-69, or has failed and neglected to comply with the provisions of section 1465-69.

APPENDIX B.

Rules of the Industrial Commission of Ohio Governing Procedure in Claims Against the State Insurance Fund and the State Occupational Disease Fund.

Rule 1—Sessions of the Commission.

Sessions of the Commission will be held regularly at the offices of the Commission in the city of Columbus, beginning at 9:00 a. m. of each business day, and continuing until the business of the day is completed.

Rule 7—Employer to Keep Record of Injury, Disability or Death.

Every employer shall keep a record of all injuries, fatal or otherwise and of all cases of disability or death resulting from occupational disease, received or contracted by his employes in the course of their employment. It is the duty of the employer to report all injuries and occupational diseases promptly to the Industrial Commission.

8—Procedure for Completing Applications for Injury or Occupational Disease.

Part I of each application for payment of compensation and/or for medical expense should first be completed by the employer, except for his signature, then Part II by the claimant, then Part III by the attending physician, who should return it to the employer to sign and mail to the Industrial Commission of Ohio, Claims Section, Columbus, Ohio.

If the employer finds, or has reasonable grounds to believe that the claimant's application, or the attending

physician's report, is not correct, he should make a statement to that effect in the space provided for "remarks" and should submit a separate report setting forth the reasons he does not believe the report of the claimant, or the attending physician to be correct, and such separate report may be attached to the original application bearing the full name of the injured or diseased employe.

The employer should in all instances co-operate with and assist the injured employe in completing his application and should see that the accident is fully described and that the nature and extent of the injury, or injuries, is fully disclosed and that the application is submitted to the Commission at the earliest possible date. If, for any reason, the employer fails, neglects, or refuses to furnish a proper form or to complete an application or to mail same to the Industrial Commission, a proper form should be secured from the Industrial Commission and the claimant may complete his application thereon and state that the employer has failed, neglected, or refused to furnish or complete a proper application. Such application should then be mailed promptly to the Industrial Commission, Claims Section, Columbus, Ohio.

In the event the injured employe is unable to complete an application for payment of compensation or medical expense on account of injury, or occupational disease, because of some physical disability, the application may be completed and filed by the employer or the next friend of the injured employe. In event of mental disability or incompetency, the application should be completed and filed by the employer, the next friend, or guardian of the employe.

Rule 12—Proof, How Made.

The proof of all claims shall be made by affidavit as far as possible, but the Commission, or any of its duly authorized representatives, shall have the right at any time, either before or after an award, to require the claimant to submit to a physical examination, or to refer the case for investigation, or for the taking of oral testimony, to determine the cause and extent of the injury or occupational disease. Depositions of witnesses may be taken and filed by a claimant or employer in accordance with Section 1465-50, G. C.

Failure on the part of the claimant to complete in detail, forms specified, or to submit other proof which may be requested, may be considered as sufficient reason to withhold action on the claim and to cancel the actuarial reserve against the claim. However, upon the filing of necessary proof the claim will be given such further consideration as may be indicated.

Rule 17—Hearing.

Claims for awards will be considered as assigned by the Commission on each week day not a legal holiday. Claimants and employers may appear before the Commission, either in person, or by a representative qualified to practice before the Commission. If no appearance is made, the claim will be heard and disposed of upon the proof on file, if sufficient, or may be continued until a future day, or indefinitely for attendance of the parties, or for the purpose of obtaining further proof or for any other justifiable reason.

The Commission may assign a claim for oral hearing before one or more of its members, or before a duly author-

ized representative or Referee of the Commission. Notice of the time and place of such oral hearing shall be given in advance to both the claimant and the employer. Both parties may be represented at such hearing, either in person, or by a representative qualified to practice before the Commission. When such deputy or Referee makes his report of such hearing, said report shall be referred to the Commission and thereupon notice shall be given to the claimant and the employer of the time and place of hearing such report. When the report of such hearing is submitted, the Commission may approve, modify or disapprove the findings or recommendations contained in such report.

Rule 18—Notice of Hearing.

When a claim is assigned for hearing, the claimant and employer shall be notified by mail of the time and place of the hearing.

When a claim for an award from the State Insurance Fund or the Occupational Disease Fund is assigned for hearing before the Commission, or a duly authorized representative, or a Referee, at least five days shall elapse between the date of mailing notice of such hearing and the date of the hearing. The right to notice as provided herein may be waived by the claimant or employer at the time of filing the application, or at any time prior to hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 684.

COPPERWELD STEEL COMPANY,

Appellant,

vs.

INDUSTRIAL COMMISSION OF OHIO,

Appellee.

REPLY BRIEF OF APPELLANT.

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Section 1465-90 2

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Appellee.

REPLY BRIEF OF APPELLANT.

It is true that Appellant did not in the petition and amended petition *specifically* bring into question the validity of the Workmen's Compensation Act on the ground of its repugnancy to the Constitution since the Act had not at that time been construed so as to invade the Appellant's constitutional rights; but that claim was necessarily implied in the broader allegations of the petition and amended petition that the orders of the commission unless vacated, prohibited or enjoined will deprive the plaintiff of its property without due processs of law and will deny it the equal protection of the laws.

The question whether G. C. § 871-38 is applicable to permit review of orders awarding workmen's compensation had never before arisen in a case where there was no other available remedy; and, if that section had been construed as it reads, there would of course have been no infringement of Appellant's constitutional rights. The opinions in previous cases involving other than employes of contributing employers, had consistently disclaimed any right to deprive employers of a judicial hearing in court on the legality of an award.

We agree that the state court's construction of G. C. § 871-38 must be accepted by this Court. That section is the only provision outside the Workmen's Compensation Act for review of orders of the Industrial Commission. Likewise for the purpose of this case the state court's construction of the Workmen's Compensation Act must be accepted, as denying to a contributing employer any judicial hearing upon, review of, or other remedy against, orders of the Industrial Commission awarding compensation to its employes, irrespective of the extent of the deprivation of its property resulting from assessment of increased premiums, and in spite of the state court's construction of the same act as affording a remedy to self-insuring employers and non-complying employers against whom illegal awards are made.

We agree (Appellee's Brief, p. 6) that *appeals, rehearings* or *judicial reviews* are not essential to due process of law. However we must likewise accept the repeated decisions in Ohio that the enabling provision of the state constitution does not authorize the legislature to accord finality to orders of the Industrial Commission except upon the question of fact, whether an injury, disease or death resulted from a failure of compliance with a specific safety requirement; and that an opportunity for *judicial hearing* upon legal questions must be afforded or the employer would be deprived of property without due process; and, since G. C. § 1465-90 gives a right of appeal to employes and it has been repeatedly held that self-insuring employers and non-complying employers are entitled to defend against an unlawful or unreasonable award on any legal ground, the denial of the equal protection of the laws to appellant is quite apparent (Brief of Appellant, pp. 8, 16-20, 22-24, 31-33). It is not necessary to extend to great length the argument on this point since it constitutes the clearest infringement of Appellant's constitutional rights. The erroneous suggestion (Appellee's Brief, p. 23) that we

do not press this point calls our attention to an error in printing on p. 42 of Appellant's brief matter which belongs in sub-division 5 of the argument. All of p. 42 should be read as preceding Caption 6 on p. 40.

Contrary to Appellee's brief (p. 10) there is no reference by the Supreme Court of Ohio in either opinion to an examination of the Ohio Constitution Article IV, § 2.

The decision below did not go off on a question of want of jurisdiction nor did the state court dismiss appellant's petition, contrary to Appellee's brief (p. 11). The motion to the petition was treated as a general demurrer (R. 13) not as a demurrer for want of jurisdiction, and was sustained for insufficiency of allegations to show a cause of action (R. 12, 45). Likewise the demurrer to the petition and amendment (R. 23) was not based upon any question of jurisdiction nor did the decision go off on such a question. The petition was not dismissed but was considered at length and the demurrer sustained (R. 23, 45, 46).

The assumption in Appellee's brief (pp. 11-12) that a remedy exists but that Appellant merely failed to avail itself of such remedy or chose an improper mode in pursuing the same is without foundation. We quote from the opinion (R. 17):

> "Since the allegations of the petition do not show a right to a review under § 871.38, General Code, or a right to a writ as prayed for *or other relief*, the petition is subject to a general demurrer."

The only remedy suggested by Appellee or by the Court in the final opinion below (R. 28) is that Appellant could refuse to pay the premiums, assessed after the unlawful allowance of the non-compensable claims, in the computation of which the void awards have been included. This was fully answered in the dissenting opinion below and in the Brief of Appellant, pp. 36-38.

Answering the inquiry on p. 13 of Appellee's brief, the state courts of Ohio have not previously held, and we can-

not refer the Court to any holding of the state courts of Ohio, other than the decision of the Supreme Court of Ohio in the case at bar, that the Workmen's Compensation Act should be construed so as to deny Appellant access to the courts for determining the legality of the orders of the Commission. All prior decisions have sustained the employer's access to the courts for judicial determination of legal questions, and have recognized that denial thereof would be unconstitutional.

In answer to the argument (Appellee's brief pp. 14-16) and the quotation from the opinion below to the effect that Appellant has no interest in the state insurance fund and therefore cannot be deprived of property without due process of law by being required to make excessive contributions thereto we respectfully point out that this Court is bound by the state court's holding in *Voeller v. Warehouse Company*, 136 O. S. 427 (cited in Appellant's brief p. 43) that a legal interest is not essential to the denial of due process or of the equal protection of the laws where the operative effect of a statute, the orders of the Commission, or the decision of the court is to deprive Appellant of property without due process of law. The case cited involved a section of the Ohio Corporation Act regulating the procedure for determination and payment of the value of stock of dissenting shareholders; and the court there held the provision that the value demanded by dissenting shareholders should become conclusive and binding in the absence of certain proceedings was unconstitutional by reason of its effect upon non-dissenting shareholders of the corporation not parties to the procedure.

Contrary to the suggestion of Appellee's brief (pp. 16-17), the Workmen's Compensation Act was adopted to provide benefits regardless of legal fault for employes injured and killed in the course of employment from hazards created or increased thereby, not for employes injured elsewhere or from other causes; and raising the question of the jurisdiction of the Commission does not involve the

workmen in protracted or expensive litigation. It is important that the Workmen's Compensation Act be administered within the limits of its provisions and in such way that the system will not break down but may continue to function with the continued support of the employes. The employe is not subject to litigation at all, any more than are the employes of a self-insuring employer or non-complying employer, both of which may freely show the illegality of awards. We quote from *Industrial Commission v. Drake,* 103 O. S. 628, 635, cited by the Appellee (p. 17):

> "* * * it is equally important that no claimant should be awarded a sum in excess of that to which he is fairly entitled. The state insurance fund is in the nature of a trust fund to be administered for the benefit of workmen who suffer injury, and for the dependents of those who suffer death, in the course of employment. * * * While the fund is created by premiums paid by employers, it must not be assumed that such fund can be made to meet the payment of unjust claims without an injustice being done to just claimants as well as to all workmen who may never make claims. While the premium is paid by employers, in the last analysis it amounts to a deduction from the wages due the workmen to create a fund to be administered for their benefit. * * * Any unjustified generosity in favor of one claimant must operate as an injustice to all other claimants, because the fund is to that extent improperly depleted."

Appellee's brief p. 17 suggests that it is improper and not at all necessary for an employer to attack an employe's rights to an award in order to protect his prospective financial interest in the state insurance fund. How then can it be protected? In *State ex rel. Powhatan Mining Company v. Industrial Commission,* 125 O. S. 272, it has been held that one may not attack the merit rating system and for the same reason an employer would have no standing to attack the method of fixing basic premium rates, both

of which include as factors the awards during the preceding five years.

The argument of Appellee's brief (pp. 17-22) is not material here since the demurrer admits the truth of the allegations that the injuries and deaths did not arise in the course of or out of the employment; and by sustaining the demurrer the court below declined to consider that question upon the evidence submitted to the Commission. The issue here is whether consideration of that question could constitutionally be refused.

Respectfully submitted,

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